

**THE ROLE OF THE CIRCUIT COURTS IN THE
DEVELOPMENT OF FEDERAL JUSTICE AND THE SHAPING
OF UNITED STATES LAW IN THE EARLY REPUBLIC:
SUPREME COURT JUSTICES WASHINGTON, LIVINGSTON,
STORY AND THOMPSON ON CIRCUIT AND ON THE COURT**

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Abstract

While scholars have focused on the importance of the landmark decisions of the United States Supreme Court and its Chief Justice, John Marshall, in the rising influence of the federal justice system in the early Republic, the crucial role of the circuit courts in establishing uniformity of federal law and procedure across the nation has largely been ignored. This thesis seeks to remedy this lack of research on circuit courts by revealing the central role of their presiding Supreme Court justices in the successful development of a national court system drawn up from the ‘inferior’ courts rather than down from the Supreme Court to the lower jurisdictions.

This thesis argues that, at a time when the Supreme Court had few cases to consider, all of the nation’s law was formulated by the lower courts; with very few decisions appealed, the circuit court opinions were invariably accepted as final, settling the law for each circuit and for the nation if followed by other justices. Therefore, in the early years, it was the circuit experience and not Supreme Court authority which shaped United States law.

This thesis contributes to an understanding of this early justice system because of its focus on and the depth of its research into the work of the circuit courts. Through detailed analysis, it reveals the sources used by the justices to influence the direction of the law and, by its reading of almost 2000 cases tried by four prominent Marshall associate justices, presents insights into momentous issues facing the Union. The thesis examines the generality of the circuit work of each justice but pays particular attention to the different ways in which each contributed to the shaping of United States law. Understanding the importance of the role of the circuit courts leads to a more informed reading of early American legal history.

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Introduction

This thesis examines the role of the United States circuit courts in the formation of a federal legal system in order to understand the extent to which the opinions of Supreme Court justices, presiding over those courts, individually and collectively, shaped federal law to meet the political and economic challenges facing the emerging Republic. The focus is on the period 1801-1835, the tenure of Chief Justice John Marshall, because this was the time in American legal history when the most defining and far reaching federal law foundations were laid.

A number of issues faced the justices of this era. They were tasked with riding circuit with few federal statutes or Supreme Court opinions to guide them and had to decide which sources of law to use to achieve a uniform federal justice system. There were legal and political dimensions of their circuit work. First, they administered federal criminal law and resolved civil disputes. Second, they strove to ensure that the novel concept of federal justice was well-received regionally.

My investigation of the role of the circuit courts has led me to question the premise that the Supreme Court rose to prominence, in the main, through its landmark decisions. This thesis examines a factor in the development of the federal court system which has remained largely unexplored. Scholars covering the crucial early years of the Republic have concentrated on Chief Justice John Marshall and the major constitutional Supreme Court opinions. Those opinions which asserted the power of judicial review, involving the right to strike down as unconstitutional federal and state legislative acts, have deservedly commanded academic interest

because of the part they played in the Court's rising influence.¹ However, such an approach to the Court's history ignores the role of the justices on circuit in the emergence of federal law which can be ascertained only by examining the disputes which fell for resolution in the circuit courts and the manner in which the justices determined the issues. That is the basis of this research which focuses on the legal principles established by the large number of cases dealt with at circuit level at a time when the Supreme Court had very little business to conduct. Domnarski (1996) puts it well when he writes, 'the lower federal courts are where the action is.'² Whilst he refers to modern times, he accurately represents the position of the Early Republic.

The research also examines the effect on the development of federal law of the political tensions between the Republican-led Congress and the judicial nationalism of a Federalist dominated Supreme Court; its struggle for the sole right to interpret the spirit and meaning of the United States Constitution and for the power, on the grounds of uniformity, to review federal and state legislation and state court decisions. It also investigates the effect these ideological differences had on the justices' circuit opinions.

¹ The major works on the Supreme Court are 1. Charles Warren, *The Supreme Court in United States History*, 2 vols. Revised edition (Boston: Little Brown & Co., 1926); 2. George Haskins & Herbert A. Johnson, *History of the Supreme Court of the United States, vol. II, Foundations of Power: John Marshall, 1801-1815* (New York: Cambridge University Press, 2010), originally published by Macmillan Publishing in 1981; 3. G. Edward White, *History of the Supreme Court of the United States, vols. III-IV, The Marshall Court and Cultural Change, 1815-1835* (New York: Cambridge University Press, 2010), originally published by the Macmillan Publishing Company in 1988). The most complete coverage of the earlier Jay and Ellsworth Courts is to be found in Julius Goebel Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (New York: The Macmillan Company, 1971). A wealth of primary material is contained in Maeva Marcus (ed.), *The Documentary History of the Supreme Court of the United States, 1789-1800*, 8 vols. (New York: Columbia University Press, 1985-2007), and in Herbert A. Johnson & Charles F. Hobson (eds.), *The Papers of John Marshall, 1773-1835*, 10 vols. (Chapel Hill: University of North Carolina Press, 1974-2006).

² William Domnarski, *In the Opinion of the Court* (Urbana & Chicago: University of Illinois Press, 1996), 90.

Novak (1966) refutes the myth of American statelessness advanced by those scholars who support the view that the essence of nineteenth-century government was its absence. He does so by using over one thousand cases, statutes and regulations to demonstrate the ‘pivotal role played by public law, regulations, order, discipline, and governance in early American society.’³ By investigating almost two thousand opinions, this thesis builds upon Novak’s work by establishing the far reaching effects of the emerging body of federal law on the personal and business affairs of American citizens.

Federal law was shaped, in the first instance, by the many disputes dealt with at circuit level which were subject to appeal to the Supreme Court by way of writ of error. Because so few circuit opinions were appealed, they were generally regarded as final resolutions and, therefore, shaped that branch of law for the circuit and, if followed by other justices, for the nation. Interstate and international commerce, the prohibition of international slave trade, embargo and neutrality breaches arising from European conflicts and the War of 1812 with Britain, and the delicate positioning of state sovereignty within the powers of central government were all issues which featured heavily in circuit court dockets. However, slavery was so much a part of American life, and endorsed by the Constitution that the plight of the African-American slave already within the United States rarely featured either at circuit or Supreme Court level.

The justices chosen for the core of this research are, in order of appointment, Bushrod Washington, Brockholst Livingston, Joseph Story, and Smith Thompson. They have been selected because, whilst there are some similarities in their

³ William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996), 1-6.

jurisprudence, each demonstrates distinctive contributions to the development of federal law. Washington's dependence on English law; Livingston's advancement of commercial law; Story's admiralty expertise and his fascination with common law; and Thompson's states' rights stance and his promotion of the Cherokee cause reveal how each, in his own way, shaped American law. Time and space does not permit a study of all fourteen Marshall Court associates. However, the four justices chosen were amongst the most prominent contributors; had long tenures on the Court; and there is sufficient primary material available from which to reach meaningful conclusions.

The thesis will examine the federal circuit and Supreme Court opinions of all four justices and the New York State Supreme Court opinions of Livingston and Thompson to ascertain the sources on which they drew, the expertise they developed in particular branches of law, and the effect that expertise had on Chief Justice Marshall's opinion assignment process. Any changes of jurisprudential direction from presiding in circuit court to sitting as one of seven justices in the Supreme Court also receive scrutiny.

In its first decade, from 1789, the United States Supreme Court delivered only thirty-eight opinions whereas, although the exact figure will never be known, the circuit courts must have dealt with several thousand cases.⁴ This factor alone speaks to the importance of the circuit courts in the overall picture. The grand jury charges delivered by the justices at the beginning of each circuit session designed to forge a bond between citizen and government are further evidence of the significance of the local courts in the reception federal justice. The use of a certificate of division of

⁴ *United States Reports*, vols. 2-4.

opinion, when the justice sat with the district judge, enabling the circuit courts to choose which cases were sent to the Supreme Court for definitive rulings was a further device in the search for uniformity. Crucially, the circuit courts were the forums in which the justices gained expertise or honed skills gained earlier at the Bar which lent to their Supreme Court opinions a confidence and authority stemming from their collective circuit experience. In other words, this thesis argues that, in the early years, the successful development of the national court system fed up from what the Constitution described as the ‘inferior’ circuit courts rather than down from the Supreme Court to the lower jurisdictions.

Graham (2010) is critical of scholars who have focussed on Marshall and the Supreme Court to the detriment of the circuit and district court where he finds, in early Rhode Island, most of the federal judicial activity took place. He argues, ‘it was the daily operation of the federal courts in each of the states, rather than the efforts of a single individual or even the results of a series of Supreme Court cases, that allowed the judiciary to emerge as an equal branch of government.’⁵ This thesis seeks to build upon Graham’s research to ascertain whether his finding in one constituent part of the First Circuit between 1790 and 1812 can be supported over a much wider geographical area for a longer period. Despite the fact that Graham’s research ends in 1812, it is valuable because it highlights the significance of the grand jury charge and supports the view, taken here, that the political element of the charge began to disappear after Justice Chase’s impeachment in 1805 for its misuse. Graham’s examination of Justice Story’s 1812 charges reveals only instructions to the jury on the law.⁶ One can see the sense in Graham’s further argument that the

⁵ D. Kurt Graham, *To Bring Law Home: The Federal Judiciary in Early National Rhode Island* (Dekalb: Northern Illinois University Press, 2010), 6.

⁶ *Ibid.* 106.

Rhode Island federal courts were a powerful nationalizing force in supporting the federal government and the interests of the local merchant class when he cites the remarks of Story's predecessor, Justice Cushing, in his 1794 grand jury charge, that the court would harness the power of the community to compel dishonest men to perform their contracts. This is a fine example of judicial rhetoric designed to persuade the local people that they had a stake in government.⁷

Johnson (1997) is the first scholar to spell out the importance of the associate justices as a body and to regard the circuit courts as 'the training grounds' for Supreme Court justices. He argues that the circuit duties of the justices brought them into contact with the grass roots of American life and gave them, when sitting on the Supreme Court, an insight into the difficulties facing trial judges.⁸ In a 2009 essay he recommends that the individual experiences of justices be examined to see how their circuit work shaped their personal perspectives as well as their approach to constitutional questions.⁹ This thesis responds to that call for further research but does so by examining their approaches to all manner of issues and not just those bearing on the Constitution.

In a 1970 essay, Newmyer investigates Justice Story's activities on circuit dealing principally with his ties with the local people and his working relationships with the district judges and the legal profession. He does not seek to analyse Story's circuit opinions. He focuses on the circuit court influence on the character of the Supreme Court's decisions and their acceptance by the people.¹⁰ Relying on the

⁷ Ibid. 14. Cushing's charge appears in Marcus, Maeva, (ed.), *The Documentary History of the Supreme Court of the United States, 1789-1800; The Justices on Circuit*, vol. 2 (New York: Columbia University Press, 1988), 491-496, 491 & 492.

⁸ Herbert A. Johnson, *The Chief Justiceship of John Marshall* (Columbia: University of South Carolina Press, 1997), 137.

⁹ Herbert A. Johnson, 'Bushrod Washington,' *Vanderbilt Law Review*, 62:2 (2009), 490.

¹⁰ R. Kent Newmyer, 'Justice Story on Circuit and a Neglected Phase of American Legal History,' *The American Journal of Legal History*, vol. 14, No. 2 (1970), 112-135, 134-135.

correspondence of Justices Story and Baldwin, expressing satisfaction that so few of their circuit opinions had been taken to the Supreme Court, Newmyer rightly deduces that ‘decisions of the circuit court were in the most instances final, binding the parties and establishing law for the circuit.’¹¹ This is crucial because it is further support for the argument that, in the very early years, those circuit opinions were more important than those of the Supreme Court. Because circuit opinions were handed down by Supreme Court justices, they were more readily accepted by the parties, more so than an opinion delivered by a competent local district judge.

Most other scholarly references to the circuit courts are restricted to describing the physical and emotional hardships of circuit riding and the justices’ repeated efforts to end the duty. That focus has meant that the importance of circuit jurisprudence has been largely ignored. Save for the scholars mentioned above, all attention has centred on the importance of the Supreme Court landmark cases and John Marshall. The calls for further research into the role of the circuit courts in the development of federal law have yet to be met. This research begins that process by an in depth examination and analysis of 1,445 circuit and 325 Supreme Court opinions of the four chosen justices in order to ascertain the influence of the circuit court in American legal history.

The justices were obliged to wait for the end of circuit riding until the Evarts Act of 1891 which abolished the courts to which they had travelled for so many years. They had fought hard to end the duty from the very beginning of the federal court system.¹² Congress, however, had seen the wisdom of establishing local

¹¹ Ibid. 113-114. Letter, Story to McLean, May 25, 1838 in *McLean Papers*, Library of Congress; Letter Henry Baldwin to District Judge Joseph Hopkinson, February 20, 1840 in Hopkinson Papers, Pennsylvania Historical Society.

¹² Several justices resigned after a short time on the Court, all citing the physical rigours of circuit riding and long periods of separation from family. John Blair Jr. resigned in 1796 after 5 years; Thomas Johnson in 1793 after only 15 months; and Alfred Moore in 1804 after 3 years. (*The*

federal justice in the major cities of each circuit to cement relationships, through the justices, between citizen and federal institutions. I argue that, without the justices' circuit riding, the reception of federal law would have been infinitely more difficult and the shaping of United States law a much more drawn out process. Whilst United States justices have not ridden circuit for almost 125 years, in England and Wales, High Court justices still travel the country to administer justice, a practice originated by Henry II in the 1166 *Assize of Clarendon*. Darbyshire (2011) asked twenty-six senior judges for their opinions on, *inter alia*, judges riding circuit. They favoured the system for a number of reasons. Some cases were so serious as to require the attention of a High Court Judge and it was thought that the presence of a High Court judge based in London would deter local practices.¹³ Acknowledging the function of the Marshall justice as more akin to a campaign to develop and win acceptance for a new concept of law, whereas the English judge's circuit duty is to police a long-established centrally controlled justice system, there are parallels in the search for uniformity and the fact that the English High Court judges, when dealing with appeals from the lower courts, will be, as were the Marshall justices, better informed of local problems and difficulties facing provincial circuit and district judges in the performance of their duty.

The Myth of Marshall's Dominance

While the emphasis is on the period between 1801 and 1805, the tenure of Chief Justice Marshall, it is particularly important to examine the federal legal system from its establishment in 1789 in order to understand the Court's transition

Supreme Court of the United States: Its Beginnings & Its Justices, 1790-1991 (Washington D.C: Commission on the Bicentennial of the United States Constitution, 1992), 64, 68 & 76.

¹³ Penny Darbyshire, *Sitting in Judgment: The Working Lives of Judges* (Oxford & Portland Oregon: Hart Publishing Ltd, 2011), 315.

from virtual obscurity, at the time of Chief Justice Jay's resignation in 1795 and his later refusal to return to the office in 1801, to an institution playing a much more effective role in government by the end of Marshall's tenure forty years on.¹⁴ This thesis examines the factors which enabled the Court's rise in influence, despite deep political opposition to the concept of federal justice and it does so by focusing on the circuit courts' role in that transformation.

Until recently, biographers of Chief Justice John Marshall have taken the line that he achieved prominence for the Court by himself because he dominated fellow justices and persuaded them to his point of view by the sheer force of his drive and personality. In the first comprehensive account of his life and works, from 1916, the admiration which Albert J. Beveridge had for his subject is evident from each of the four volumes.¹⁵ His description of Marshall as a 'king on a throne' gives the flavour of his adulation.¹⁶ Beveridge makes repeated references to Marshall's dominant personality and unparalleled influence over his associates.¹⁷ Similarly, Corwin (1919) begins his biography of the Chief Justice by pronouncing him 'the Hildebrand of American constitutionalism,' and ignores the contribution of the associate justices.¹⁸ Decades later, Baker (1974) wonders how the United States might have developed without Marshall's decisions, despite acknowledging that the

¹⁴ When declining an invitation to return as Chief Justice in 1801, Jay expressed an unwillingness to take part in a system which treated the justices' opinions on circuit riding with 'neglect and indifference.' He felt that the Supreme Court did not have the standing to support the national government or command the respect of the public. Letter, John Jay to President John Adams, 2 January, 1801 in Maeva Marcus (ed.), *The Documentary History of the Supreme Court of the United States, 1789-1800*, vol. 1, part 1 (New York: Columbia University Press, 1985), 146-147. The reasons for Jay's lack of enthusiasm are detailed in Matthew Van Hook, 'Founding the Third Branch: Judicial Greatness and John Jay's Reluctance', *Journal of Supreme Court History*, vol. 40, no. 1 (2015) 1-19, 4-6.

¹⁵ Albert J. Beveridge, *The Life of John Marshall*, 4 vols. (Cambridge, Mass: Riverside Press, 1916).

¹⁶ *Ibid.* vol. 4, 82.

¹⁷ *Ibid.* vol.4, 59-60.

¹⁸ Edward S. Corwin, *John Marshall and the Constitution: A Chronicle of the Supreme Court* (Akron, Ohio: Summit Classic Press, 2013), 2, a reprint of the 1919 first edition).

Court consisted of six associates whom Marshall led but did not control.¹⁹ Thus, the works of Beveridge, Corwin, and Baker suggest that Marshall's associates were mere thin echoes of the Chief Justice's voice.

In his distinguished biography of Justice Story in 1985, Newmyer describes the composition of the Court in 1812 as 'less than awesome,' pointing to Marshall as the 'only proven jurist.' He asserts that the remaining justices comprised a 'confusion of specialities and a disparity of talents that threatened to weaken the Court as an institution.' Newmyer bases this view on 'Marshall's lack of expertise in maritime law, Todd's usefulness extending only to Virginia/Kentucky land disputes, and Duvall having no particular specialization.'²⁰ Whilst Newmyer acknowledges that all of the justices save for Marshall, Washington, and Story had sat as state supreme court justices, he does not observe that, by 1812, as well as their Supreme Court sittings, three justices had had the invaluable experience of presiding over busy federal circuit courts; Washington for thirteen years, Johnson for eight years and Livingston for five years. Therefore, there is no acknowledgment of the importance of circuit work in American legal history. Not all members of the Court made the same contribution to the Court's rise in its influence but this research questions the suggestion that by 1812 there were insufficient men of intellect, learning, and experience in post to advance the Court to a prominent position in government. In any event, whilst the Court was composed of great jurists such as Marshall and Story, one needs to consider whether the strength of the Court lay in the collective wisdom of all of its justices.

¹⁹ Leonard Baker, *John Marshall: A Life in the Law* (New York: Macmillan Publishers, 1974), 540-541 & 767-768.

²⁰ R. Kent Newmyer, *Supreme Court Justice Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985), 80.

In more recent times scholars have accepted that Marshall relied heavily on his associates. Hobson (1996) accepts that, although the Court often spoke through Marshall, ‘the opinion was the product of collaborative deliberation, carried on in the spirit of mutual concession and accommodation.’²¹ However, as his book is an account of Marshall’s jurisprudence, it does not detail the nature of the support Marshall received. Ten years later Hobson went further, writing that ‘scholarship has long exploded the myth of a heroic Marshall who dominated the Supreme Court by the sheer force of his individual genius and will.’²² Despite that acknowledgement, he still argues that Marshall’s ‘intellect, learning, and personality’ enabled him to achieve success in ‘molding [the justices] into a collective entity which spoke with a single authoritative voice.’²³ He considers Marshall’s willingness to compromise in order to achieve unanimity as ‘useful in managing his “family” of brother Justices.’²⁴ His references to Marshall ‘moulding’ and ‘managing’ his associates are further examples of an insufficient acknowledgment of the importance of the contributions of the associates individually or collectively and, in a way, perpetuates the myth that the Court was Marshall.

Whilst Newmyer describes Story’s considerable contribution to the Court, Johnson (1997) is the first scholar to spell out the important influence of the associates as a body and regard the circuit courts as ‘the training grounds for Supreme Court justices.’²⁵ He seeks to strike a balance between those academics

²¹ Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), 16. In 2006, Hobson completed the editing of the magnificent 12 volume set of *The Papers of John Marshall*, begun by Herbert A. Johnson in 1974 (Chapel Hill: University of North Carolina Press, 1974-2006).

²² Charles F. Hobson, ‘Defining the Office: John Marshall as Chief Justice,’ *University of Pennsylvania Law Review*, vol. 154, No. 6 (2006), 1421-1461, 1421.

²³ *Ibid.* 1423.

²⁴ *Ibid.* 1424.

²⁵ Herbert A. Johnson, *The Chief Justiceship of John Marshall* (Columbia: University of South Carolina Press, 1997), 137.

whom he describes as ‘impassioned Marshall advocates and those who believe that the contribution of the associates was ‘of greater significance and quality.’²⁶ Johnson was able to give only a brief overview of the role of all of Marshall’s associates in a work directed to Marshall’s life.²⁷

Robarge (2000) is another who believes that Marshall’s success was attributable to his ‘personal dominance over the Supreme Court for much of his tenure.’ He cites with approval, insofar as it related to the first ten years of the Chief Justice’s tenure, President Jefferson’s criticism that Marshall craftily manipulated ‘lazy or timid associates’ to his point of view.²⁸ Whilst Robarge acknowledges that Marshall did require help from his colleagues from time to time, he suggests that he was demonstrating his open-mindedness and a desire to let the associates feel they were contributing to decisions. He regards the requests as part of a technique to obtain justices’ future votes.²⁹ I contend that Marshall’s letters to his colleagues are simply cries for help from a Chief Justice who really did need assistance and not with any ulterior motives. His letter to the senior associate, Justice William Cushing, concerning the trial in 1807 of former Vice-President Aaron Burr for treason, is a worried and urgent cry for advice. He wrote, ‘It would have been my earnest wish to consult with all of my brethren on the bench...Sincerely I do lament that this wish cannot be completely indulged.’ Expressing his doubts and fears, he continues, ‘I must anxiously desire the aid of all of the judges [on] the doctrine of constructive

²⁶ Ibid. 3-4.

²⁷ Ibid. Chapter 1, ‘The Chief Justice and his Associates,’ 21-50.

²⁸ David A. Robarge, *A Chief’s Progress: From Revolutionary Virginia to the Supreme Court* (Westport, Conn: Greenwood Press, 2000), 253-254. Letter, Thomas Jefferson to Thomas Ritchie (Republican journalist), December 25, 1820 in Merrill D. Peterson (ed.), *Thomas Jefferson: Writings* (New York: Library of America, 1984), 1446.

²⁹ Robarge, 255.

treason.³⁰ That was not the device of a Chief Justice who wished to make his associates feel wanted, it was the letter of a judge faced with an intricate and politically sensitive trial in desperate need of the advice and support of his colleagues. Other letters from Marshall requesting help from Justices Washington and Story are not expressed in such urgent tones but it is apparent from their content that he has problems which require assistance on topics with which he was unfamiliar.³¹

Save for a reference to Joseph Story's 'powerful and exuberant intellect,' Robarge is dismissive of the associates, referring to Todd and Duvall as 'ciphers,' Samuel Chase as 'a boorish Federalist,' McLean as a 'decorous Jacksonian,' and William Johnson as 'contentious,' which is most likely a reference to his propensity to dissent.³² In a chapter on Marshall's tenure on the Court, Justices Livingston and Thompson do not rate a mention, flattering or otherwise and the entire chapter pays little attention to the associates. When Robarge acknowledges the importance of circuit work generally, he does so to argue that Marshall 'shaped the contours of nineteenth-century America through his circuit opinions.' He asserts that Marshall's individual circuit contributions were a strong force in transforming the federal courts into a true national judiciary because the Fifth Circuit was one of the busiest and his circuit opinions involved more points of law than any other justice.³³ He downplays the circuit contributions made between 1801 and 1835 of the fourteen associates, some of whom presided over equally busy circuit courts in New York, Boston, and

³⁰ Letter, John Marshall to William Cushing, June 29, 1807 in *Papers of John Marshall*, vol. VII, 60-62.

³¹ In all ten letters from John Marshall requesting help from his associates have survived to *The Papers of John Marshall*. A selection of those letters appear in Chapter 1 of this thesis when dealing with consistency of opinions across the circuits.

³² Robarge, 255.

³³ *Ibid.* 261-262.

Philadelphia and whose expertise in admiralty law Marshall was unable to match. The inference is that, Story apart, the influence of the associate justices was small when compared with that of the Chief Justice and is a further disregard of the positive influence of a number of significant justices.

Scholars, therefore, differ in their interpretation of the respective parts played by the Chief Justice and his associates in the Court's rise in prominence, but the suggestion that Marshall did it alone has not completely disappeared. More scholars are beginning to accept that the role of the associates in the Court's transformation was substantial. However, the focus of any book or essay on Marshall will not permit of an in-depth consideration of the individual or collective contributions of associate justices. What is required for a better understanding of the emergence of an effective federal court system is an examination of the link between the circuit work of a group of major associate justices and the growth in influence of the Supreme Court. This thesis seeks to end the myth that Marshall was the Court. By a detailed examination of the work of these four justices on the Court, but more so on circuit, it seeks to position them as significant contributory factors in the success of the federal court system.

The changes in how the Supreme Court delivered its opinions reflect the struggle to establish its authority. During the Chief Justiceship of John Jay (1789-1795) the few opinions were generally delivered *seriatim* with the junior justice speaking first even though the justices were agreed upon the result. Chief Justice Ellsworth (1796-1800) was the first to prefer the practice of a single opinion preceding rare dissents. In his absence, the justices resorted to *seriatim* opinions.³⁴

³⁴ William R. Castro, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995), 110-111.

To counter repeated attacks by Republican supporters, a problem not faced by the first two Chief Justices, Marshall felt it necessary not only to present to the nation a united front by the almost exclusive use of the single opinion but also by delivering the majority of the opinions himself which, as will appear, infuriated President Jefferson. The apparent unanimity behind the single opinion is part of what Johnson described as the 'small group dynamics' of the Marshall Court, concluding that the justices were able to hide their differences and produce an opinion acceptable to all or to a majority. This, he argues, was made possible by the harmonious collegial residence in the same lodgings, and the need of a small mainly Federalist body to present a united front in the face of repeated challenges from a Republican administration and others who opposed what they considered to be an overly strong federal judiciary.³⁵ It is, therefore, likely that this close harmony also engendered mutual support on circuit.

Johnson develops his 'small group dynamics' theory in a 2000 essay comparing the Marshall Court with the European Court of Justice and the need of each higher jurisdiction to be sensitive to the demands of their component states. He argues that the dynamic might develop from the sharing of tasks and exchange of specialized knowledge or the introspective or internal bonding which occurs when a small group is opposed by a larger outside body.³⁶ This is another aspect of decision making which this research will address.

During his thirty-five year tenure as Chief Justice, Marshall delivered 537 of the Court's 1236 opinions and orders for directions.³⁷ Kelsh (1999) has analysed the

³⁵ Johnson, 'Bushrod Washington,' 449-450.

³⁶ Herbert A. Johnson, 'Judicial Institutions in Emerging Federal Systems: The Marshall Court and the European Court of Justice,' *John Marshall Law Review*, vol. 33, issue 4 (2000), 1063-1108, 1067.

³⁷ *United States Reports*, 1801-1835.

opinion delivery practices of the Court in its early years, observing that between 1790 and 1800, 71% of the cases reported in the *United States Reports* were simply noted as being ‘by the Court’ with no justice named. 24% of the opinions were recorded as *per curiam* after *seriatim* opinions by individual justices.³⁸ However, after Marshall took office and the single opinion of the Court became the norm, he dominated the delivery of opinions. Towards the end of his tenure, justices felt free to deliver concurrences or dissents.³⁹ He reserved to himself all constitutional issues save for those cases in which he had a personal interest when he recused himself. This was not unusual as, throughout the history of the Court, Chief Justices have delivered many of the landmark opinions. However, the difference between now and then is that Marshall wrote the Court’s opinion in a vast proportion of the mundane cases.

Whilst accepting, at that time, the use of the single opinion as a defence mechanism, the compromise of strongly held views to produce a unanimous opinion had the obvious disadvantage of stifling different standpoints and inhibiting public debate. To understand the value of dissent, one need look no further than Justice Thompson’s powerful dispute with the majority in *Cherokee Nation v. Georgia* which effectively formed the basis of the Court’s majority opinion in *Worcester v. Georgia*, the following year.⁴⁰

The single opinion, delivered invariably by Marshall, is the basis of the widely held view that Marshall was the Court. Without wishing to detract from his leadership and political acumen, an examination of case reports and contemporary

³⁸ John P. Kelsh, ‘Opinion Delivery Practices of the United States Supreme Court, 1790-1945,’ *Washington University Law Quarterly*, vol. 77 (1999), 137-152, 140.

³⁹ *Ibid.* 143.

⁴⁰ Both cases are discussed in detail in Chapter Five.

correspondence reveal that this was not the case. It is clear that the opinions he delivered in many occasions would have benefitted from the assistance he received from his associates rather than they being entirely the product of his own researches. This is so because of the extent and quality of the majority opinions, concurrences, and dissents of the associates evident in the remaining 696 opinions. The letters from Story and Washington to Marshall, examined in Chapter One, helping him resolve points of law in his circuit and Supreme Court opinions provide further support of associate participation.

Two justices throw light on the exchange of views in those early Supreme Court conferences held at the house in which all of the justices lodged during term in Washington. Story, writing to a friend in 1812, informed him, ‘We moot questions as they are argued, with freedom, and derive no inconsiderable advantage from the pleasant and animated interchange of legal acumen.’⁴¹ In another letter Story proffered further insight into the decision making process, writing, ‘My familiar conferences at our lodgings often come to a very quick, and I trust, a very accurate opinion, in a few hours.’ He went on to express his delight at the successful outcome of the first opinion he had been assigned to write, remarking, ‘My own views were those which ultimately obtained the sanction of the whole court.’⁴² It would appear that his draft opinion had been revised after consultation with the other justices.

Further evidence of the collaborative decision-making process appears in an undated letter from Justice John McLean who served on the Court from 1829 to 1861. He described the scene thus:

⁴¹ Letter, Joseph Story to Nathaniel Williams, February 16, 1812 in W.W. Story, *The Life and Letters of Joseph Story*, vol. 1 (London: John Chapman, 1851), 214.

⁴² *Ibid.* 215-216. Letter, Joseph Story to Samuel Fay, February 24, 1812. The opinion Story referred to was *Fitzsimmons et al. v. Ogden et al.*, 7 Cranch 2 (1812).

Before any opinion is formed by the Court, the case after being argued at the Bar is thoroughly discussed in consultation. Night after night this is done, in a case of difficulty, until the mind of every judge is satisfied, and then each judge gives his views of the whole of the case, embracing every point in it. In this way the opinion of the judge is expressed, and then the Chief Justice requests a particular judge write, not his opinion, but the opinion of the Court. And after the opinion is read, it is read to all the judges, and if it does not embrace the views of all of the judges, it is modified and corrected.⁴³

McLean does not draw a distinction between the practice during his six years with John Marshall and the twenty-four years he served subsequently with Chief Justice Roger Taney. It is reasonable to infer that the protocol was consistent throughout his entire tenure. These contemporaneous accounts support the more recent view that, individually and collectively, the justices did not merely sit back and leave it all to their Chief.

Domnarski does not appear to accept McLean's account of the mechanics of decision making because he writes, 'But for Marshall, getting the work out quickly rather than accountability was the goal. Often, drafts of the Court's opinions were not even circulated to the brethren, which meant that they had no say in the reasoning.'⁴⁴ Clearly, opinions had to be delivered within a reasonable period otherwise the Court would be swamped by outstanding business. However, the idea that Marshall simply handed down opinions without a majority consensus is inconceivable and Domnarski cites no authority for this startling assertion. One can understand why a justice would not write out six extra copies of his draft but it does not follow that his copy was not circulated or, as Justice McLean records, read out to the justices for their comments. The accounts of Justices Story and McLean of how the justices debated and decided cases refute Domnarski's argument that often the associates had no say in the reasoning of opinions. If further proof is required,

⁴³ Undated letter, Justice McLean to a Methodist newspaper in McLean Papers, Library of Congress, box 18, cited in John F. Frank, *Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784-1860* (Cambridge: Harvard University Press, 1964), 174.

⁴⁴ Domnarski, *In the Opinion of the Court*, 32.

Justice William Johnson aired many complaints in a letter to former President Jefferson in 1822 about the lack of ability of certain justices and the disappearance of *seriatim* opinions in favour of the single opinion of the Court. At no stage did he suggest that an opinion of the Court was delivered without his knowledge of its content.⁴⁵ The accounts of Story and McLean and the absence of criticism by Johnson establish full consultation in the Marshall Court decision making process.

This thesis looks beyond participation in decision making to the shaping of American law through the Chief Justice's opinion assignment practice. The majority opinions assignments were not distributed equally as some justices were much more active than others. For example, the *United States Reports* reveal that Justice Todd who sat with Marshall for twenty years only delivered twelve majority opinions and Justice Duvall in twenty-three years handed down the same number. At the opposite end of the scale Justice Story who spent twenty-four years with Marshall wrote one hundred and eighty-three opinions. That disparity is the reason why this research examines the effect of circuit expertise on the Chief Justice's opinion assignment practice. Analysis of the circuit and Supreme Court opinions of a particular justice will reveal a particular speciality and help an understanding of why a certain type of opinion was assigned to him.

Washington, Livingston, Story, and Thompson

The decision to focus the research on these four justices was made after their cases had been extracted from the 30 volume set of *Federal Cases, 1789-1880* and from volumes 2-33 (1790-1835) of the *United States Reports*. These two sets of

⁴⁵ Letter, Justice William Johnson to Thomas Jefferson, December 10, 1822 cited in Donald G. Morgan, *Justice William Johnson: The First Dissenter* (Columbia: University of South Carolina Press, 1954), 181-182.

reports are central to the research and constitute the most important sources of primary material. From the 18,000 district and circuit court opinions in *Federal Cases*, 1,377 circuit opinions of all fourteen Marshall associate justices were examined together with the 1,236 Marshall Court opinions in *United States Reports*.⁴⁶

The first step was to determine those justices with sufficient opinions from which to reach meaningful conclusions. It should be noted that whilst all Supreme Court opinions were recorded, the absence of law reporters on certain circuits meant that many early opinions were lost because some judges did not commit them to paper. The second, and more important, step was to reduce the candidates to those whose reports best reflected events and issues facing the nation; revealed distinctive approaches to the resolution of their caseloads; and how they shaped American law. Having considered those matters, it became clear that Justices Washington, Livingston, Story, and Thompson were prominent associates who each made significant contributions in different ways to aspects of United States law.

Dealing with the justices in order of seniority of appointment, Washington sat with Marshall for twenty-eight years, presiding over the Third Circuit (Pennsylvania and New Jersey) from 1803 to 1823. Livingston served on the Court for fifteen years, riding the Second Circuit (Connecticut, New York, and Vermont) from 1808 to 1823. Story joined the Court in 1811 and spent twenty-four years with Marshall and on the First Circuit (Massachusetts, Maine, New Hampshire, and Rhode Island).

⁴⁶ The *Federal Cases, 1789-1880*, 30 vols. plus index (St. Paul, Minnesota: West Publishing Company, 1894-1897) contain opinions by Washington (540); Story (456); Marshall (101); Thompson (77); Baldwin (48); Livingston (47); McLean (33); Paterson (18); Iredell (13); Todd (11); William Johnson (10); Samuel Chase (9); Duvall (4); Jay (3); Wilson (3); Cushing (2) and Ellsworth (2).

Finally, when Livingston died in 1823, Thompson replaced him on the Court and on the Second Circuit and served with Marshall until the latter's death in 1835.

The circuit opinions of Justice Washington between 1803 and 1827 are to be found in *Federal Cases* and in three volumes edited by Richard Peters which he compiled from the justice's manuscript notes.⁴⁷ In 1827 Elijah Paine Jr. edited a volume of New York, Connecticut and Vermont circuit cases, containing a small selection of the opinions of Justice Livingston between 1810 and 1822 and those of his successor Justice Thompson between 1823 and 1826.⁴⁸ There is much more primary material to assist with an evaluation of Joseph Story's work in the fourteen volumes of his circuit opinions edited by four law reporters with some degree of overlapping, which, taken with the *Federal Cases*, provide substantial evidence for an accurate assessment of the circuit aspect of his career.⁴⁹ The reports of Story's circuit and Supreme Court opinions are complemented by the justice's many law books and, in particular, by his *Commentaries on the Constitution of the United States*. William Story's *Life and Letters of Joseph Story* and *The Miscellaneous Writings of Joseph Story* are invaluable sources of primary material on the thoughts and jurisprudence of this innovative scholar from Massachusetts.⁵⁰

⁴⁷ Richard Peters, *Reports of Cases Argued and Determined in the Third Circuit: Comprising the Districts of Pennsylvania and New Jersey, Commencing at April Term, 1803-1827*, 3 vols. (vol. 1, Philadelphia: William Fry, 1819); vols. 2 & 3 (Philadelphia: Philip H. Nicklin, 1827).

⁴⁸ Elijah Paine Jr., *Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit: Comprising the Districts of New-York, Connecticut, and Vermont* (New York: R. Donaldson, 1827).

⁴⁹ John Gallison (ed.), *First Circuit Reports, 1812-1815*, 5 vols. (Boston: Wells & Lilly, 1815-1817); Charles Sumner (ed.), *First Circuit Reports*, 3 vols. (Boston: Charles C. Little & James Brown, 1836-1841); William P. Mason (ed.), *First Circuit Reports, 1816-1830*, 5 vols. (Boston: Hilliard, Gray, Little & Wilkins, 1819-1831); W.W. Story, *First Circuit Reports*, 3 vols. (Charles C. Little & James Brown, 1842-1845).

⁵⁰ Joseph Story, *Commentaries on the Constitution of the United States*, 3 vols. (Boston: Hilliard, Gray & Company, 1833); W.W. Story (ed.), *Life and Letters of Joseph Story*, 2 vols. (London: John Chapman, 1851); W.W. Story (ed.), *The Miscellaneous Writings of Joseph Story* (Boston: Charles C. Little & James Brown, 1852).

During his twenty-eight year tenure Justice Washington wrote 80 opinions for the Supreme Court and 540 of his circuit opinions have survived. Justice Livingston wrote 39 Supreme Court opinions and had 47 of his circuit opinions reported. Justice Story was more prolific with 149 opinions of the Court and 456 reported circuit opinions. Justice Thompson delivered 57 opinions of the Court and had 77 circuit opinions reported. The distinction between the high number of reported circuit opinions of Washington and Story and the other two justices is because Washington made notes of his opinions which were later transcribed and because Story had the advantage of an efficient law reporter. Although the federal Second Circuit was a busy court, unlike the New York State Supreme Court, it had no law reporter. Consequently, few circuit opinions were recorded. However, because Livingston and Thompson had been justices of the New York State Supreme Court, a large number of their state opinions are available. Those state reports supplement their rather meagre federal circuit court opinions and help to create a fuller picture of the jurisprudential philosophy of each justice.⁵¹

Other scholars, apart from Johnson, have examined Washington's work. Having placed a selection of Justice Washington's major circuit opinions against a background of 'dramatic, social, cultural, and economic change,' and of a new nation requiring a new legal system, Faber (2000) detects a cautious approach to Washington's jurisprudence and argues that he had a restraining effect on the more controversial approaches of Marshall and Story, which 'moderating influence enhanced the wisdom of the great constitutional decisions by restricting their

⁵¹ For a comprehensive study of the history of law reporting see, Erwin C. Surrency, 'Law Reports in the United States,' *The American Journal of Legal History*, vol.25, No. 1 (1981), 48-66. It was not until 1817 that Congress authorized the appointment of an official law reporter for the U.S. Supreme Court.

reach.’⁵² Stonier (1998) concludes that Washington’s strength lay on circuit rather than in the Supreme Court. He does not find Washington to be a cautious justice. Instead, he describes the justice’s attitude to decision making as that of ‘a confident authority of one who sees himself as the embodied voice of federal law.’⁵³ Faber and Stonier acknowledge that they could not do justice to Washington’s voluminous reported circuit opinions and, therefore, confined themselves to a limited selection. This examination of all of Washington’s reported circuit opinions will show whether he was the confident judge seen by Stonier or generally a cautious justice too dependent on precedent and overly-concerned should his opinions fail to survive appeals.

The lack of emphasis on circuit courts and the activities of the less prominent justices is evidenced by the fact that, apart from a short essay by Dunne (1969) and terse entries in biographical dictionaries, little is known of Justice Livingston. No research has been undertaken on his circuit and Supreme Court activities. Dunne believes that Livingston’s significant judicial work was performed, not on the Supreme Court, but as a puisne judge of the New York State Supreme Court and rightly describes Livingston as ‘an elusive and half glimpsed figure of his age.’⁵⁴ Certainly no detailed comparisons of his work on circuit and on the Court have been published. In fact, he has been largely ignored by scholars for forty-five years. Justice Thompson has suffered a similar fate with no scholarly attention to his

⁵² David A. Faber, ‘Bushrod Washington and the Age of Discovery in American Law,’ *West Virginia Law Review*, vol. 102 (2000), 735-807, 807.

⁵³ James R. Stonier, ‘Heir Apparent: Bushrod Washington and Federal Justice in the Early Republic,’ in Scott Gerber (ed.), *Seriatim: The Supreme Court before John Marshall* (New York: New York University Press, 1998), 322-349, 341.

⁵⁴ Gerald T. Dunne, ‘Brockholst Livingston,’ in Leon Friedman & Fred L. Israel (eds.), *The Justices of the United States Supreme Court, 1789-1969*, vol. 1 (New York: Chelsea House Publishers, 1969), 387-403, 395.

Supreme Court and circuit work for over fifty years since Roper's 1963 PhD biography published in 1987.⁵⁵

Justice Story has not undergone the same anonymity as his two colleagues. Aside from the wealth of primary material described earlier, there is a detailed 1970 'exploratory essay' by one of his biographers, R. Kent Newmyer which deals with the neglected topic of how an examination of the circuit courts collectively and individually will lead to a better understanding of the decision making process of the Supreme Court.⁵⁶ Newmyer shows why the circuit courts deserve further study and how to test that approach by examining Joseph Story's work on the First Circuit.⁵⁷ Although the essay touches briefly on the nature of Story's circuit opinions, it is valuable in setting the caseload against the need for the courts to cope with current events such as the expansion of American shipping during the early years of the Napoleonic Wars and the rise in home manufacturing as a result of the embargo on trade with belligerent nations. Newmyer points to the declaration of war on Britain by the United States in 1812, leading to many questions of international law and maritime and prize law relating to the disposition of captured vessels and cargo which were determined, in the first instance by either the federal district or circuit courts. He believes Story to be well qualified to deal with these branches of the law simply because of his extensive practice at the Bar.⁵⁸ I consider whether his sittings in the circuit court not only consolidated but greatly enhanced the knowledge gained as an advocate.

⁵⁵ Donald Malcolm Roper, *Mr Justice Thompson and the Constitution* (New York: Garland Publishing, Inc., 1987).

⁵⁶ R. Kent Newmyer, 'Justice Joseph Story on Circuit: A Neglected Phase of American Legal History,' *The American Journal of Legal History*, vol. 12, No. 2 (1970), 112-135. See also Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon & Schuster, 1970); James McClellan, *Joseph Story and the American Constitution* (Norman: University of Oklahoma Press, 1971).

⁵⁷ Newmyer, 'Story on Circuit,' 112.

⁵⁸ *Ibid.* 116.

Turning to Story's circuit opinions resolving commercial disputes, Newmyer considers them to be 'the framework for the regular and orderly conduct of economic affairs'⁵⁹ Merchants respected his opinions and were better able to arrange their business affairs in the light of his pronouncements. As to his circuit opinions generally, he observes that during Story's thirty-three years on the circuit bench, 734 of his opinions were printed and circulated in legal journals thereby securing for him national importance.⁶⁰ This would have the practical effect of making his opinions more readily accessible to lawyers outside New England for citing on their circuits; another step on the road to consistency across the nation. There have been biographies of other Marshall's associates which although dated are still very useful, but they also pay little attention to the importance of circuit work, an omission which this research seeks to remedy.⁶¹

This thesis examines the approaches of circuit justices to the questions of existing property rights in land, the promotion of commerce on land and at sea, and the establishing of rights and responsibilities of merchants in respect of commercial contracts and negotiable instruments. Those circuit opinions also shed light on the vulnerability of the nation during hostilities with Britain around the time of the War of 1812; the troubled issue of slavery; and reveal how individual justices on circuit resolved politically sensitive, emotionally charged and historically significant questions. The opinions on circuit and on the Court also reflect the tensions between Federalist and Republican over the nature of government and the powers of the

⁵⁹ Ibid. 125.

⁶⁰ Ibid, 129-130.

⁶¹ Francis P. Weisenburger, *The Life of John McLean: A Politician on the United States Supreme Court* (Columbus: The Ohio University Press, 1937); John E. O'Connor, *William Paterson: Lawyer and Statesman, 1745-1806* (New Brunswick, N.J: Rutgers University Press, 1979); James Haw, Francis Beirne, Rosamund Beirne & R. Samuel Jett, *Stormy Patriot: The Life of Samuel Chase* (Baltimore: Maryland Historical Society, 1980).

federal judiciary to monitor state legislatures and courts which placed the justices under extreme political pressure. The justices were acutely aware of the need to strike the delicate balance between state sovereignty and the power of federal government. This led the Supreme Court, on occasion, to deliver compromise opinions designed to avoid direct confrontations with hostile Republican opponents at a time when the Court was reeling from the restoration of circuit riding duties, threats of impeachment, and the suspension of its sittings for over a year.⁶²

Against this background the federal judiciary found it prudent to exercise caution and not antagonize a Republican majority in Congress. The justices had constant reminders that a substantial part of the public did not share Marshall's vision of a Supreme Court tasked with interpreting the Constitution and the intent of its framers. Republicans were incensed at the prospect of the Court overruling legislation enacted by a Republican majority in Congress. The justices, therefore, realized that every opinion of the Court which impinged upon state sovereignty would be subjected to close critical scrutiny, adding to the temptation to avoid controversy at a time of weakness.

In establishing uniformity of federal law and procedure across the circuits, in addition to the few Supreme Court opinions and federal statutes, the justices, whose legal training had centred on *Blackstone's Commentaries on the Laws of England*, looked to the English cases and writers to solve problems upon which United States law had still to make provision. An examination of circuit opinions discloses how the justices drew from all available sources, and, in particular, how, to varying

⁶² *Stuart v. Laird*, 5 U.S. 299 (1803) where the Court refused to contest the re-introduction of circuit riding by a Republican dominated Congress: *Marbury v. Madison*, 5 U.S. 137 (1803) in which the Court, whilst declaring it had the power to judicially review an Act of Congress, refused to order the Jefferson administration to deliver Marbury his commission as a justice of the peace.

degrees, they adapted English law to fit the social and economic needs of the new Republic.⁶³

The thesis is divided into five chapters. Chapter One outlines the origins of the federal court system through the fierce opposition to the concept of federal government in the Constitutional Convention and ratification debates to the establishment of the Supreme Court and the circuit and district courts by Congress. It also examines the relationship between federal and state courts and considers the business of the circuit courts against the historical and cultural background of cases generated by an expanding market economy, immigration, westward expansion, land disputes, neutrality, and embargo restrictions arising from European conflicts and the 1812 War with Britain. It explores the political divide between Federalist and Republican and its effect on the way in which the federal courts decided cases. It further explains the way in which the justices overcame the lack of guidance from so few United States statutes and Supreme Court opinions; how they sought to achieve a consistent system of law across the nation by using state opinions, English law and by exchanging circuit experiences. It examines the importance of circuit riding in the consolidation of federal authority through local federal justice and by the justices' use, in the very early days, of the politically charged grand jury address.

Chapter Two focuses on specific aspects of the circuit and Supreme Court opinions of Justice Washington to discover the extent to which his jurisprudence was founded on the strict application of the doctrine of binding precedent despite a

⁶³ *Blackstone's Commentaries* was first published in England between 1765 and 1769. In 1771 it was printed in the United States for the first time; an exact copy of the London 1770 4th edition. In 1803 St. George Tucker's American version of *Blackstone* was published in Philadelphia by William Young Birch and Abraham Small. Its value to American lawyers lay in the fact that it explained how the United States Constitution and the Bill of Rights had altered English law in America. It also covered subjects such as freedom of expression and slavery laws.

rigidity which occasionally resulted in injustice; his Federalist approach to balancing state sovereignty with the powers of a strong central government which generally came down in favour of the federal government; and the extent to which his view of his own slaves as mere items of property to be disposed of as and when he wished affected his approach to the slavery cases he tried.

The reasons for Justice Livingston's changing political alliances from Federalist to ardent Republican and finally to the Federalism of his youth are examined in Chapter Three as an example of the fluidity of political allegiances during this period. Also considered is his contribution to the development of United States commercial law with particular reference to the responsibilities flowing from bills of exchange and promissory notes, the lifeblood of interstate and international trade. His belief, unusual for this period, in the fallibility of jury verdicts and his willingness to set aside those which did not accord with his view of the case has been considered worthy of investigation.

Justice Story's wish for clarity in federal law, revealed by his determined but failed efforts to import the common law into federal criminal and admiralty law, is investigated in Chapter Four together with his success in importing common law into commercial cases with a diversity aspect and his codification of criminal law to bolster the inadequate federal criminal legislation then in force. Also explained is how, by repeated exposure to maritime contracts and embargo cases on circuit, he became the Court's leading admiralty expert. Last, but not least, the chapter acknowledges the great value to researchers of his voluminous correspondence illuminating the inner workings of the Marshall Court.

Chapter Five explores why Justice Thompson's endeavours to promote state sovereignty and affirm state legislation disappointed his nominating president, James

Monroe, and how his unwillingness to strike down state legislation stemmed from a lack of separation of powers in New York State where he sat as a State Supreme Court justice and on the Council of Revision which vetted all state bills and invariably approved them. The chapter also examines his efforts to shape federal law to protect the Cherokee Nation from Georgia's oppression and his less than successful attempts to alleviate the plight of the African-American slave.

This thesis, whilst acknowledging the considerable contribution of the Chief Justice and the landmark opinions to the Court's success, will establish the circuit court as the foundation of federal court authority by establishing a rapport between government and citizen and by its creation of a uniform system of federal law across the nation acceptable to the majority. The circuit court experience enhanced not only the justices' individual reputations but also their collective standing as members of the nation's highest tribunal. Further, the combined expertise, gained by presiding over the increasingly busy circuit courts, gave them the confidence and authority to transform the Supreme Court from a position of weakness upon John Marshall's appointment as Chief Justice in 1801 to an institution playing an effective role in government by the time of his death in 1835.

Chapter One

The Federal Circuit Courts: Shaping Local and National Justice for an Emerging Republic

This chapter examines the challenges faced by the justices in their efforts to establish a federal court system, the sources from which they fashioned federal law, and their efforts to achieve uniformity of decision making across the Union. Those responsible for establishing the legal system of any new nation will, of necessity, consider foreign models and adopt such principles of law which best fit their needs. The chapter explains how the justices used federal statutes, Supreme Court opinions, state and English law to establish a system of law acceptable to the majority and to fulfil the dual judicial and political role entrusted to them by Congress. Their first task was to administer law and procedure consistently across the circuits and resolve local litigation. They were also expected to convince the nation that stability and prosperity lay in strong national government underpinned by a system of federal law. Both undertakings were set against a background of widespread fears that a strong federal system of government and judiciary might lead to an oppressive regime similar to that faced by the people under British rule. This chapter examines how the justices faced determined opposition to any diminution of states' sovereignty, their shaping of United States law on circuit and the ways in which they sought to convince the public of a need for strong central government and a system of federal law.

The Politics of Federal Law

Determined opposition to the concept of a separate federal judiciary and its probable political role was expressed at the Constitution Convention, the various ratification conventions and the debates preceding the passing of the Judiciary Act of

1789 which established the federal court system. Those debates show the divisions between Federalists determined to achieve a powerful national government underpinned by a federal judiciary and Republicans who were suspicious of any body, be it political, legislative or judicial which would diminish the rights of the states to control their own affairs. Watts (1987) expresses contemporary fears by painting a negative picture of the Federalists as a party clinging to ‘paternal traditions of elitism’ ... which ‘expressed fear of, or distain for, the self-made man.’ He regards the Federalist promotion of Atlantic trade solely for growing profits for the merchants to preserve the existing social order. On the other hand, he regards the Republicans as ‘designers and shapers of a new order’ in which hard-working men might thrive economically to counter the ‘decay and decline which would result from Federalist domination.’¹ The suggestion that the federalists were concerned only to further the interests of the ruling classes is not borne out by the many circuit opinions examined in the following chapters, which reveal that whilst the justices did preserve existing property rights and promote commerce, they did so for the benefit of all members of society and not just the elite. Despite the ratification of the Constitution and the passing of the Judiciary Act 1789, those party differences persisted and placed at risk the future of the federal judiciary because of the insuperable problem of striking a balance between federal powers and states’ sovereignty.

To fulfil the demanding judicial and political roles President Washington, appointed to the Court experienced and leading lawyers, strongly committed to Federalist ideals. The importance to him of the political aspect is apparent from a

¹ Steven Watts, *The Republic Reborn: War and the Making of Liberal America, 1790-1820* (Baltimore: John Hopkins University Press, 1987), 13.

letter he wrote to Chief Justice John Jay in 1789 describing the judicial department as ‘the keystone of our political fabric.’² He repeated this view when writing to the justices before they went out on circuit for the first time requesting them to let him know how the people reacted to local federal justice and to control by central government.³ He ensured that the associate justices came from different states, thereby establishing regional diversity as an important criterion.⁴ The practice of appointing justices by areas was sensible because each justice would be conversant with the law and procedure of his region, gained from practice at the bar or from sitting as a judge of the state court. Although the law and practice varied from state to state, there would always be one justice on the Court familiar with the law of the state from whence the appeal or writ of error came. A geographic balance was also politically motivated because the states were more likely to support a justice from their area they knew and respected.

As well as selecting justices from different areas, President Washington ensured that the justices were men who had played a significant role in the ratification of the Constitution and were, therefore, committed to the notion of a strong national government.⁵ He believed the political philosophy of a justice more important than his judicial experience anticipating that the federal judiciary would interpret the Constitution in a way which would fortify the position of central government. Whilst he nominated some who had never sat as judges, he chose exceptional lawyers who had achieved great success at the Bar.⁶ James Wilson, one

² Letter, President Washington to John Jay , October 5, 1789, reproduced in Henry P. Johnson, *The Correspondence and Papers of John Jay*, 4 vols., vol. 3 (New York: Burt Franklin, 1890), 378.

³ Letter, President Washington to the Justices of the Supreme Court, April 3, 1790, reproduced in Marcus, *Documentary History*, vol. 2, 21.

⁴ Ron Chernow, *Washington: A Life* (London: Allen Lane, 2010), 602.

⁵ Melvin I. Urofsky, *A March of Liberty: A Constitutional History of the United States*, vol. 1 (New York: Oxford University Press, 3rd ed., 2011), 167.

⁶ Wood, *Empire of Liberty*, 412.

of the original associate justices and a signer of both the Declaration of Independence and the Constitution, had no judicial experience but was one of the country's leading lawyers who lectured at the College of Philadelphia (later to become the University of Pennsylvania).⁷ His law lectures reproduced in his *Collected Works* demonstrate an extensive knowledge of the law.⁸ Washington's nomination of Wilson suggests that he and the Senate viewed the Court as a body which would not confine itself to narrow points of law but would, when delivering an opinion would have regard not only to the relevant law but also any political aspect of the case.

The efforts to set up a uniform cross circuit system of federal law must be viewed against the continuous party political divisions between Federalists and Republicans and the attacks on the federal judiciary by extremist elements of the Republican majority in Congress which threatened the very existence of the federal judiciary. A mere twelve days after President Jefferson took office, Republican Representative William Branch Giles in his letter of congratulation asked the President to dismiss all Federalist judges including those of the Supreme Court.⁹ Jefferson clearly felt that he would not have the support of Congress to remove Supreme Court justices and, therefore, compromised in the Judiciary Act of 1802 by removing from office the federal circuit judges appointed by President John Adams on the eve of his departure from the White House, thereby restoring the justices'

⁷ Steve Sheppard (ed.), *The History of Legal Education in the United States; Commentaries and Primary Sources*, 2 vols. vol. 1 (Pasadena, California: Salem Press Inc., 1999), 15.

⁸ Kermit L. Hall & Mark David Hall, (eds.), *The Collected Works of James Wilson*, 2 vols. (Indianapolis: Liberty Fund, 2007).

⁹ Letter, William Branch Giles to Thomas Jefferson, March 16, 1801 in Dice Robin Anderson, *William Giles: A Study in the Politics of Virginia and the Nation from 1790-1830* (Menasha, Wisconsin: Collegiate Press at George Banta Publishing Co., 1914), 77.

circuit riding duties. One effect of the 1802 Act was to rearrange the sitting pattern of the Court so that it could not reconvene for eighteen months.¹⁰

The Court sat again on February 24, 1803, and Chief Justice Marshall delivered the historic opinion of *Marbury v. Madison*. Whilst criticizing Jefferson's Secretary of State for refusing to deliver to William Marbury his commission from President Adams appointing him a justice of the peace, the Court refused to order that Marbury should have his commission, Marshall holding that Congress was not empowered to pass that part of the Judiciary Act of 1789 which extended the original jurisdiction of the Court to grant a writ of mandamus. In effect, the Court found that that particular part of the Act was inconsistent with the Constitution and the Constitution must prevail. In an extremely politically sensitive case the Court appeased the Federalists to some extent by declaring that Marbury should have had his commission, and at the same time placating the Republicans by holding that the Court did not have jurisdiction to grant the relief. Most importantly, Marshall held that the Constitution empowered the Court to review the acts of the executive and the legislature.¹¹ This was the first and only time the Court declared it had the authority to judicially review an act of Congress; a power suggested by Alexander Hamilton in Federalist 78 some fifteen years earlier when he remarked that 'where the will of the legislature declared in statutes, stands in opposition to that of the

¹⁰ There is a wealth of scholarship dealing with Republicans' repeated attempts to undermine the federal judiciary; Joseph Wheelan's, *Jefferson's Vendetta: The Pursuit of Aaron Burr and the Judiciary* (New York: Carroll and Graff Publishers, 2005) details Jefferson's private and public attacks on John Marshall who presided over the circuit trial of Burr; Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971), argues that the struggle over the federal court system was generated by extremists of both parties; James F. Simon's *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (New York: Simon & Schuster, 2002) charts Jefferson's determination to thwart a Federalist dominated Court.

¹¹ *Marbury v. Madison*, 5 U. S. 137 (1 Cranch), 1803.

people declared in the constitution, the judges ought to be governed by the latter, rather than the former.’¹²

Marshall’s compromise rankled with Jefferson for the remainder of his life and he made his distaste for the federal judiciary clear in a letter the following year to Abigail Adams, the wife of former President John Adams, complaining of the partiality of the Federalist judges, and, in a clear reference to *Marbury v. Madison*, expressing the view that the right claimed by the Court to review the acts of the executive and the legislature made the judiciary a despotic branch of government.¹³

Jefferson was no stranger to the impeachment proceeding process. In 1797, justifiably aggrieved at the presentment of a grand jury against a Republican state representative on an allegation that he had breached the Sedition Act of 1798 by criticism undermining the federal government, he wrote to James Monroe suggesting that the grand jury be impeached for interfering with a citizen’s freedom of speech. His petition requesting impeachment was received favourably by the Virginia House of Delegates but not acted upon.¹⁴ Jefferson himself faced the threat of impeachment in 1781 for allegations of incompetence whilst Governor of Virginia.¹⁵

Impeachment reared its head once more when Jefferson sought to attack the federal judiciary by instigating proceedings to remove from office Federal District Judge John Pickering of New Hampshire. Pickering was unfit to remain in office due to mental illness, but the Constitution provided for removal from judicial office only

¹² Publius (Alexander Hamilton), The Federalist No. 78, May 28, 1788 in Joanne B. Freeman, (ed.) *Hamilton: Writings* (New York: Library of America, 2001). 423.

¹³ Letter Thomas Jefferson to Mrs Abigail Adams, September 11, 1804 in Lester Capon (ed.), *The Adams-Jefferson Letters* (Chapel Hill: University of North Carolina Press, 1959), 278-280.

¹⁴ Letter, Jefferson to Monroe, September 7, 1797 in Paul Leicester Ford, *The Works of Thomas Jefferson*, vol. VIII (New York: G.P. Putnam’s Sons, 1904), 339-340.

¹⁵ Peter Charles Hoffer & N.E.H. Hull, *Impeachment in America, 1635-1805* (New Haven: Yale University Press, 1984), 85-86.

in the case of treason, bribery or other high crimes and misdemeanours.¹⁶ Nevertheless, the Republican majority in the Senate removed him from office.¹⁷ Significantly, shortly before the Senate tried Pickering, Jefferson was instigating impeachment proceedings against Justice Samuel Chase for his intemperate bias during Alien & Sedition trials against Republicans and for his public attacks on the Maryland Republican administration. He wrote to Congressman Joseph Hopkinson who was managing the Pickering trial suggesting impeachment proceedings against Chase but wishing not to be known as the instigator.¹⁸ The impeachment proceedings instigated in 1804 against Chase failed as the Senate decided that his conduct did not meet the necessary ‘high crimes and misdemeanour’ threshold. District Judge Richard Peters was threatened that he too would be impeached, on the grounds that he had sat with Chase on the Alien and Sedition trials. Fortunately for him the House refused to sanction his impeachment, but the possibility of proceedings caused him great anxiety.¹⁹

An independent judiciary is crucial to the fair and impartial administration of justice. All judges must be free to perform their duty without political pressure and threats of dismissal for failure to follow the policies and ideals of a ruling party. It would appear, however, that during Jefferson’s presidency, for the federal judiciary to assert its independence and claim the power to review an Act of Congress, was sufficient cause to undermine federal law and remove judges from office. This

¹⁶ United States Constitution, Article II, section 4.

¹⁷ See President Jefferson’s message of February 3, 1803 to the House of Representatives placing Pickering’s case before the House for consideration of impeachment. In James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, vol. 1 (Washington D.C: Bureau of National Literature and Art, 1905), 356.

¹⁸ Henry Adams, *History of the United States of America During the Administration of Thomas Jefferson* (C. Scribner’s Sons, 1889), Library of America Edition edited by Earl N. Habert, 1986), 402-403.

¹⁹ Letters, District Judge Richard Peters to Senator Timothy Pickering, Pickering Papers MSS, XXVII, 46 & XXXI, 101, cited in Warren, *The Supreme Court*, vol. 1, 281-282.

was a far cry from Jefferson's view expressed in a letter to George Wythe as far back as 1776, writing that 'The judicial power ought to be distinct from both the legislature and executive, and independent upon both...they [the judges] should not be dependent upon any man.' He did, however, propose impeachment for 'misbehaviour.'²⁰ Subsequent events would appear to show that he later viewed as misbehaviour the holding of political views differing from the government.

Attacks against the Federalist judiciary were also directed at state judges. The Pennsylvania Republican party began a campaign to impeach and remove a number of Federalist state judges. In 1803 the State Senate impeached and removed from office Judge Alexander Addison on purely party political grounds just eight days before Jefferson began to pursue District Judge Pickering.²¹ The following year the Pennsylvania House of Representatives impeached Chief Justice Edward Shippen and associate justices Thomas Smith and Jasper Yeates, all Federalists, for alleged high misdemeanours. All three judges were acquitted by the State Senate as moderates within the party refused to support dismissals.²² There were no further impeachments, Jefferson, in 1807, announcing in a letter to Senator William Giles that the device was of no use in dislodging members of the federal judiciary. The letter also reveals his orchestration of the prosecution for treason of his former Vice-President Aaron Burr in the Richmond circuit court presided over by John Marshall. Jefferson complained of Marshall's trickery and his search for loopholes in the

²⁰ Letter, Jefferson to Wythe, July 1776 in Paul Leicester Ford (ed.), *The Works of Thomas Jefferson*, vol. 2 (New York: G.P. Putnam's Sons, 1904), 219

²¹ Albert J. Beveridge, *The Life of John Marshall* (Boston & New York: Houghton Mifflin Company, 1919), vol. III, 163-165.

²² Hoffer & Hull, *Impeachment in America*, 221-227.

prosecution case.²³ He was furious when the jury acquitted Burr of treason and believed that Marshall had connived in the acquittal. Normally he restricted his criticisms of the judiciary to private correspondence. However, on this occasion in his Seventh Annual State of the Union Message, he expressed his profound disagreement with the not guilty verdict, questioning whether the acquittal was due to ‘a defect in the testimony, in the law, or in the administration of the law.’²⁴ Here, by suggesting that the acquittal may have been caused by the ‘administration of the law,’ he was asking the country to accept his view that Marshall connived at Burr’s escape from sentence of death. The acquittal clearly preyed on his mind because seven years later he complained of ‘our cunning chief justice twisting Burr’s neck out of the halter of treason.’²⁵ There were no further impeachment proceedings during the remainder of his second term of office but this undermining of the judiciary between 1801 and 1809 and threats to remove from office those judges who displeased him made the justices’ duties on circuit and on the Court much more challenging. Although Jefferson abandoned impeachment, his opposition to the federal judiciary remained strong even after he had left office.²⁶

²³ Letter, Thomas Jefferson to Senator William Branch Giles, April 20, 1807, in Albert Ellery Bergh, *The Writings of Thomas Jefferson*, <http://www.constitution.org/tj/jeff.htm> 1173-1176 (accessed 26.04.2015).

²⁴ Fred L. Israel, *The State of the Union Messages of the Presidents, 1790-1966*, 3 vols. (New York: Chelsea House/ Robert Hector Publishers, 1966), vol. 1, 93.

²⁵ Letter, President Thomas Jefferson to President John Adams, January 14, 1814, in Capon, *Adams-Jefferson Letters*, 423.

²⁶ In 1810 Jefferson regarded the death of Federalist Justice William Cushing as ‘a circumstance of congratulation,’ because it enabled President Madison to nominate a Republican justice. Letter, Jefferson to Madison, October 15, 1810 in James Morton Smith (ed.), *Republic of Letters: The Correspondence between Thomas Jefferson and James Madison, 1776-1826*, 3 vols. (New York: W.W. Norton and Company, 1995), vol. 3, 1646; There are also his attempts to interfere with the practice of the Supreme Court’s single opinion by writing to Justice Johnson and President Madison to persuade justices to issue seriatim opinions. Letter, Jefferson to Johnson, October 27, 1822 in Merrill D. Peterson (ed.), *Thomas Jefferson: Writings* (New York: Library of America, 1984), 1459-1463. Letter, Jefferson to Madison, June 13, 1823 in Ford, *Jefferson: Works*, vol. 12, 296. There are many more examples of Jefferson’s attempts to undermine of the federal judiciary long after his retirement.

The Grand Jury Charge: A Bond between Government and Citizen

At the beginning of each term, on all circuits, the presiding justice delivered a charge to the grand jury, the main purpose of which was to inform members of the grand jury of the law applicable to cases they were later to try. At the same time it enabled a justice to endorse federal government policy and many early grand jury charges had heavy political overtones. The importance of the grand jury was recognized in the Fifth Amendment to the Constitution which provides that ‘no person shall be held for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury.’ The differences between the currently approved grand jury charge and those of the late 18th century and early nineteenth century are striking. Federal judges today simply remind the grand jury of its function under the Fifth Amendment, stressing the jury’s independence, and that it stands between the government and the person under investigation.²⁷ This is a far cry from the overtly political statements of the early justices. Albert J. Beveridge, John Marshall’s biographer, observed, in 1919, that the justices used their charges to preach on religion, morality, and partisan politics.²⁸ This was, as Henderson (1971) noted, merely a continuation of the practice of judges during the colonial and revolutionary periods.²⁹ Grand jury charges during the first decade of the federal courts were printed in local newspapers and, therefore, the justices’ message to the jury would have a wide circulation.³⁰ The charge of Justice Samuel Chase to a Baltimore grand jury in 1803, in which he fiercely denounced the Republican

²⁷ Model grand jury charge approved by the Judicial Conference of the United States, March 2005. URL: www.uscourts.gov/federalcourts/jury/service/modelgrandjurycharge.aspx (accessed 26.04.2015). The model is merely a guide to judges and may be amended to suit circumstances.

²⁸ Albert J. Beveridge, *The Life of John Marshall*, 4 vols, vol. 3 (Boston: Houghton, Mifflin Company, 1916-1919), 30. n. 1.

²⁹ Dwight D. Henderson, *Courts for a New Nation*, (Washington D.C: Public Affairs Press, 1971), 40.

³⁰ Erwin C. Surrency, *History of the Federal Courts*, (New York: Oceana Publications, Inc., 2002). 281, n. 47.

administration, taken with his general intemperance on the bench, resulted in the impeachment proceedings other justices were unlikely to face as their charges were mild in comparison and which despite a political content attracted little attention from Republican newspaper proprietors.³¹

On his first circuit in 1790 Chief Justice Jay set the tone by explaining to the grand jury that the new nation needed a federal system of justice to overcome many differing state laws which were for the benefit of individual states rather than the whole Union.³² When dealing with the birth of the federal court system, in language that was moderate and persuasive, Jay stressed the importance of administering federal justice locally and accepted that putting such a system in place was not an easy undertaking.³³ He acknowledged the task of reconciling state and federal court jurisdictions as complex but promised that every effort would be made to ensure that they would be ‘auxiliary instead of hostile to each other’.³⁴ Jay declared the grand jury system as the best possible means of bringing offenders to justice.³⁵ His purpose was to forge a bond between the national government and the federal judiciary on the one hand and the grand jury and through it the wider public on the other hand. His concluding remarks to the grand jury are suggestive of a partnership between the citizen and the government to be overseen by the good offices of the federal judiciary. His message, in concluding his charge, was very clear. If the citizens

³¹ The controversial extract of Chase’s charge is reprinted in Haw et al., *Stormy Patriot*, (Baltimore: Maryland Historical Society), 214-215.

³² Charge of John Jay to the Grand Jury of the Circuit Court for the District of New York on April 12, 1790, reprinted in Marcus, *Documentary History*, vol. 2, 25-30.

³³ *Ibid.* 27.

³⁴ *Ibid.* 28.

³⁵ *Ibid.* 29.

supported the national government and its laws, the government and the federal judiciary would ensure that their rights and liberties were fully protected.³⁶

Jay's charge to the grand jury in Boston that spring was in like terms. It was well received. The foreman of the grand jury praised the 'very excellent charge,' and expressed the hope 'that the circuits might continue to be visited by justices of the same, learning and integrity and ability as the current incumbents.' The foreman requested and was given in due course copy of the charge for the press which ensured a much wider audience.³⁷ Justice James Wilson received similar praise in Philadelphia in the same term and, again, a request from the grand jury foreman for a copy of the charge for publication. It was printed in full in the *Pennsylvania Gazette* of April 12, 1790. It also received wide coverage in newspapers in New York, Boston, New Hampshire, and North Carolina as did the same charge by Wilson in Delaware, Virginia, Maryland, and Rhode Island between May and July 1790.³⁸ The Boston based *Massachusetts Centinel* of May 1, 1790 acclaimed Wilson's 'able and masterly' delivery and his demonstration of 'the efficacy and superiour (sic) excellence of that [government] established in the United States.'³⁹ Wilson's charge was unusual because, although it praised the Constitution and the institutions of grand and petty juries, it did not seek to promote the virtues of either federal government or federal justice. The charge was simply a commentary on the Constitution and the relevant law.⁴⁰ He was at pains to assure the grand jury that the citizen was protected because all acts of state and federal legislatures must conform

³⁶ Ibid. 30.

³⁷ Ibid. vol. 2, 61.

³⁸ Ibid. vol. 2, 33.

³⁹ Ibid. vol. 2, 41.

⁴⁰ Ibid. vol. 2, 33-45.

to the Articles of the Constitution which was meant to accommodate ‘the dispositions, manners, and habits of those, for whom it was intended.’⁴¹

Wilson’s politically neutral charge was in stark contrast to that which the turbulent Justice Samuel Chase delivered to the Baltimore Grand Jury on May 2, 1803. He used the charge to protest the Republican led Judiciary Act of 1802 which terminated the offices of sixteen federal circuit judges. He also denounced the Maryland Assembly’s decision to abolish the State General Court and its extension of suffrage based on property owning rights to include all white males, which he declared would ‘rapidly destroy all protection to property, and security to personal Liberty; and our Republican Constitution will sink into a Mobocracy, the worst of all possible Governments.’ He ended his charge with a personal attack on the framers of the current Maryland legislation, accusing them of ‘pulling down the beautiful fabric of wisdom, and republicanism, that their fathers had erected.’⁴²

Justice James Iredell’s charge to a Republican grand jury which appeared in the *Augusta Chronicle* of October 17, 1791 met with faint praise. Whilst the Georgia jury thanked the justice for his charge on the law, the foreman launched into a comprehensive list of objections to federal government policies and a demand for a Bill of Rights guaranteeing a Republican form of government to each state.⁴³ Finally to add to Iredell’s discomfort the foreman complained that the federal judiciary of the United States was too expensive to maintain.⁴⁴ The grand jury clearly resented a federal government interfering with state sovereignty. The complaint that the federal

⁴¹ Ibid. 33.

⁴² Samuel Chase, Charge to grand jury, May 2. 1803. Vertical File. Maryland Historical Society cited in Haw, *Stormy Patriot*, 214-215.

⁴³ Marcus, *Documentary History*, vol. 2, 216-224 for Iredell’s charge, and 224-225 for the grand jury’s presentments.

⁴⁴ Ibid. vol. 2, 225.

judiciary was too expensive was just another way of saying the state's judicial system was fit for purpose and could cope very well without federal intervention. Having played a major role in North Carolina's tortuous process of constitutional ratification, Iredell knew there were many opponents of the federal system of government and was, therefore, not surprised by the hostile reception. Writing to his wife about the charge he made light of the protest by referring to 'some Presentments they made discovering some dissatisfaction at particular things, but decently expres[sed?].'⁴⁵ "Philanthropos" writing in the *Augusta Chronicle* of November 26, 1791 was highly critical of Iredell's charge, commenting that he had spent so much time extolling the virtues of the federal government that he forgot to instruct the grand jury on its duty to preserve order in society.⁴⁶

One looks to the message in the charge, the way in which it was formally accepted by the grand jury, and its reception in local and national newspapers to discover whether the grand jury charge achieved its desired effect. Its influence depended on where the message was delivered. Thus, as has been seen by comparing reactions to the charges, in the generally Federalist North the charge was usually well received and was more likely to cement relationships between the federal government and the local people, whereas charges supporting the federal government would make little impression on local opinion in any state resenting perceived federal government interference with state sovereignty. However, after the impeachment proceedings of Justice Chase, whilst the federal courts generally furthered Federalist policies the overtly political element disappeared from the grand jury charge. One is entitled to draw this inference from the absence of reporting of

⁴⁵ Ibid. vol. 2, 225-226.

⁴⁶ Ibid. 233.

charges in the primary documents examined. Had there been any controversial charges, it is more than likely they would have surfaced.⁴⁷ The grand jury charge did serve a useful purpose in the Court's first decade as, in a sense, a party political broadcast on behalf of the federal government depending upon which justice delivered the message.

The Role of the Circuit Courts in the Constitutional Ratification Debates

Whilst awaiting a body of Supreme Court guidance any jurisprudential advances depended upon the justices determining the applicable law and procedure to resolve the many and varied disputes they faced on circuit. The need to adopt a consistent approach across the circuits was crucial to the survival of the federal justice experiment. One aspect of the search for uniformity was the justices' practice whilst on circuit of exchanging experiences and seeking advice from colleagues more experienced in particular branches of law. They also looked to state laws and, because of a common legal education, relied heavily on guidance from English law to supplement available United States law.

The United States Constitution gave little guidance on the nature and extent of the powers of the federal courts. Whilst the Constitution outlined the original and appellate jurisdiction of the Supreme Court, it was silent on the extent of the jurisdiction of the 'inferior' district and circuit courts, and how the federal courts would co-exist alongside state courts, leaving jurisdictional issues to Congress. Ellis (2004) believes that President Washington deliberately avoided a battle over the

⁴⁷ In Hobson's twelve volume set of *The Papers of John Marshall* the only reference to the grand jury charge is to that delivered by Marshall at the trial of Aaron Burr for treason in 1807, in which he confined himself to the definition of treason and the evidence required to prove the offence. No text of the charge has been found. (vol. vii, 22).

shape and powers of the federal courts and left the issue to Congress because the concept was so controversial.⁴⁸ However, an alternative view is that many items of detail were deferred for full debate in Congress after the Constitution was law. The first task was to have the points of principle enshrined in the Constitution ratified by nine of the thirteen states as required by Article VII as soon as possible.

The difficulties facing the framers of the Constitution in establishing the federal courts are evident from the proceedings of the Constitutional Convention at Philadelphia between May and September 1787 and best illustrated in the speeches of George Mason and John Marshall at the Virginia Ratifying Convention in June 1788.⁴⁹ Mason believed the establishment of federal district and circuit courts would erode the rights of the state legislatures and courts to order their own affairs and posed the question, ‘What is to be left to the State Courts?’ He suggested that the object of establishing federal courts was ‘the destruction of the legislation of the states.’⁵⁰ He argued that appeals to the Supreme Court should be limited to questions of law as to empower the Court to review the facts would undermine jury verdicts.⁵¹ It is plain from his speech that two matters which concerned him greatly were his belief that the federal courts might re-open land purchases and enforce payments of debts to British subjects which many state courts had refused to countenance.⁵² Mason’s proposed amendment, which was lost, was to limit the intervention of

⁴⁸ Joseph J. Ellis, *His Excellency: George Washington* (Alfred A. Knopf, 2004), 200.

⁴⁹ A full record of the debate is contained within Max Farrand (ed.), *Records of the Federal Convention of 1787*, 4 vols. (New Haven; Yale University Press, 1937); James H. Hudson (ed.), *A Supplement to Max Farrand’s Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1987); Bernard Bailyn (ed.), *The Debate on the Constitution*, 2 vols. (New York: Library of America, 1993). More recent scholarship is to be found in Richard Beeman, *Plain Honest Men: The Making of the American Constitution* (New York: Random House, 2009), and in Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon & Schuster, 2010).

⁵⁰ Bailyn, vol. 2, 721.

⁵¹ *Ibid.* 723-724.

⁵² *Ibid.* 727-729.

federal judicial power to those causes of action accruing after the ratification of the Constitution.⁵³ In reply, Marshall assured the Committee of the Convention of the impartiality of the federal judges, going as far as to suggest that they might well be more independent than the judges of the state courts, and emphasizing the need for federal courts to alleviate overcrowded state court dockets, but, most importantly, that the state courts would not lose jurisdiction of the cases they currently decided.⁵⁴ Marshall's questioning of the independence of the state judiciary resulted from the susceptibility of resident judges to local pressure due to a lack of security of tenure. This tension between the powers of federal courts and the functions of state legislatures and judicial functions, expressed at such an early stage, would dominate political and legal thinking throughout the Marshall era and beyond. Much later, in 1833, Justice Joseph Story gave his view of the reason why the state courts had not been entrusted with cases of federal cognizance. He believed that it was perceived that local or sectional interests would prevent state courts from dealing with national issues in an independent manner, particularly as some state justices might be more concerned about the effect of their opinions on their continuing in office rather than on the national interest.⁵⁵

The Senate began to debate the Judiciary Bill in early April 1789 and the extensive political wrangling which followed delayed its signing into law by President Washington until September 24 of that year. The main hurdles delaying the bill were the fundamental questions of how much power the Constitution would transfer from the states to the nation and whether state courts should be permitted to

⁵³ *Ibid.* 729.

⁵⁴ *Ibid.* 730-732.

⁵⁵ Joseph Story, *Commentaries on the Constitution*, vol. III, 447-448.

decide on federal rights and powers, but with a right of appeal to the Supreme Court.⁵⁶

The Jurisdiction of the Federal Circuit Courts

The Judiciary Act of 1789 provided that the United States Supreme Court should consist of a chief justice and five associate justices and that the Court should sit in February and August of each year at the seat of government.⁵⁷ As to the inferior courts, the country was divided into thirteen districts with a district court for each district presided over by a district judge resident in the district.⁵⁸ The thirteen districts were organized into three circuits. The Eastern Circuit comprised New Hampshire, Massachusetts, Connecticut and New York. The Middle Circuit had within its boundaries New Jersey, Pennsylvania, Delaware, Maryland and Virginia, whilst the Southern Circuit consisted of South Carolina and Georgia. At this time Maine and Kentucky were parts of Massachusetts and Virginia respectively. Each circuit court was to consist of two justices of the Supreme Court and the district judge of the district, any two of whom were to constitute a quorum. However the district judge was not permitted to vote on any appeals from his own decisions.⁵⁹

The requirement that two justices attend each sitting of the circuit court was relaxed in 1793 by Section 1 of the Judiciary Act 1793 largely due to the justices' complaints to Congress of the hardship of circuit riding and only one justice was

⁵⁶ Urofsky & Finkelman, *A March of Liberty*, vol. 1, 164.

⁵⁷ An Act to Establish the Judicial Courts of the United States, Chapter XX, Section 1, 1 Stat., 73. The Court commenced sitting in New York in 1790, moving to Philadelphia the following year before finally settling in Washington D.C. in 1800.

⁵⁸ *Ibid.* Sections 2 & 3.

⁵⁹ *Ibid.* Section 4.

required to attend with the district judge.⁶⁰ The Judiciary Act of 1801 reduced the number of Supreme Court justices from six to five, established six federal judicial circuits and appointed sixteen new circuit judges to staff the courts, thereby relieving the justices of their circuit riding duties.⁶¹ The Republicans rightly believed that the reduction in the number of justices was a political manoeuvre designed to limit the incoming President Jefferson's ability to make appointments to the Court. The new circuits were designated as the First Circuit (New Hampshire, Massachusetts, and Rhode Island); the Second Circuit (Connecticut, New York, and Vermont); the Third Circuit (New Jersey and Pennsylvania); the Fourth Circuit (Maryland and Delaware); the Fifth Circuit (Virginia and North Carolina), and the Sixth Circuit (South Carolina and Georgia).⁶²

The repeal of that part of 1801 Act creating the new circuit judges was not far off. It was obvious that the outgoing President John Adams had packed the bench with committed Federalists which the incoming Jefferson regarded as a blatant political manoeuvre. Kerber (1970) rehearses the debate in Congress surrounding the repeal of the 1801 Act, arguing that the issue between the parties was more than a saving of salaries of the newly appointed circuit judges; the repeal of the Act was an attempt to make 'federal justice less available – all for the benefit of local government.'⁶³ The Act of 1801 had created sixteen new circuit judges; three for each circuit save for the Sixth Circuit which received only one which meant that the circuit courts would sit far more often than the Supreme Court justices could, given

⁶⁰ There is a recent essay detailing the arguments of the justices, marshalled by Jay, against circuit riding on the grounds of hardship and constitutionality in Matthew Van Hook, 'Founding the Third Branch: Judicial Greatness and John Jay's Reluctance,' *Journal of Supreme Court History*, vol. 40, No. 1 (2015) 1-19.

⁶¹ Judiciary Act 1801, Section 3.

⁶² Ibid. Sections 4 & 7.

⁶³ Linda K. Kerber, *Federalists in Dissent: Imagery and Ideology in Jeffersonian America* (Ithaca: Cornell University Press, 1970), 156.

their other duties. The abolition of the new posts resulted in less federal circuit sitting times, hence Kerber's reference to local government benefit i.e. the state courts taking in more business. The Republican majority in Congress passed the Judiciary Act of 1802, abolishing the posts of the newly appointed circuit judges and re-instating the circuit riding duties of the justices whilst retaining the new circuits. The Act assigned one justice to each circuit and restored the number of justices to six.⁶⁴ The Seventh Circuit was established in 1807 for Ohio, Kentucky, and Tennessee, presided over by the seventh justice, Thomas Todd. The various Judiciary Acts set out in precise terms the venues on each circuit at which the court would sit, and the day of the month each sitting was to commence. The circuit courts were to sit twice annually in each district.⁶⁵

The criminal jurisdiction of the federal district court, which was exclusive of the state courts, was limited to crimes against United States law, 'where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months is to be inflicted.' The district court also had exclusive original jurisdiction in civil cases of admiralty and maritime matters which included seizures on the high seas or navigable waters, and for seizures on land, and for penalties and forfeitures. All cases in the district court except admiralty and maritime matters were to be tried by a jury where issues of fact were to be resolved.⁶⁶

The circuit court had concurrent jurisdiction with the district court in respect of criminal cases but exclusive jurisdiction in all criminal cases carrying greater

⁶⁴ Judiciary Act 1802, Section 4, 2 Stat.156. President Jefferson nominated his first justice, William Johnson in 1804.

⁶⁵ Judiciary Acts of 1789, 1801 & 1802.

⁶⁶ Judiciary Act 1789, Section 9.

punishment than that which the district judge could impose.⁶⁷ In civil cases the circuit court had concurrent jurisdiction with state courts in what were termed diversity cases, involving citizens of different states or non U.S. citizens, or in cases in which the United States was a petitioner and the amount in dispute exceeded \$500. In other civil cases the jurisdictions of the circuit and district courts coincided so that litigants could choose where to commence an action. Appeals from district to circuit court in admiralty cases where the disputed amount exceeded \$300 and appeals in all other cases where the claim exceeded \$50 were by way of a full hearing in which the district judge had no vote but was permitted to record the reasons for his original opinion.⁶⁸ The Judiciary Act 1789 delivered the promises of the Federalists during the debates on the bill by giving the states' concurrent jurisdiction with the district and circuit courts in many cases, the state courts retaining jurisdiction on all matters arising under state civil and criminal law.⁶⁹

‘A Certain Uniformity of Decision in United States Law’

Congress gave little guidance to the justices as the law they should apply to resolve the disputes they encountered. The Constitution extended the judicial power ‘to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority...and to all cases of admiralty and maritime jurisdictions.’⁷⁰ The jurisdiction of the circuit courts i.e. the types of cases they were permitted to try was quite straightforward. The difficulty lay in deciding what laws were to be applied to the cases. Obviously the

⁶⁷ Ibid. Section 11.

⁶⁸ Ibid. Sections 4, 21 & 22.

⁶⁹ Ibid, Sections 9 & 11.

⁷⁰ United States Constitution, Article III, Section 2.

justices would interpret existing and future treaties, but apart from defining the law of treason, the Constitution was of little help in this regard and the justices awaited legislation from the first Congress. To add to the difficulty the Supreme Court would not produce a body of precedent for some years to come.

The Judiciary Act of 1789, whilst not solving the problem, did provide by Section 34 that ‘the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.’⁷¹ Congress was directing the federal courts to apply American law in the shape of state law until sufficient United States statutes and Supreme Court opinions were available for guidance.⁷² As Congress was pre-occupied in the early years with essential legislation establishing government departments such as the War Office, the Treasury and a temporary Post Office, very few statutes were passed to aid the justices in the performance of their duties. The primary importance in passing revenue laws meant that a law of secondary importance such as the Crimes Act of 1790 was not enacted until April 30, 1790, one year after Congress first met.⁷³ Whilst the statute covered the most serious offences such as treason, piracy, murder and arson, and the more prolific crimes of larceny, forgery, perjury and bribery, it did not prohibit all federal criminal activity. Those omissions would present problems for those justices who had no wish to fill the vacuum using English common law principles.

⁷¹ Judiciary Act 1789, Section 34.

⁷² Wilfred J. Ritz, edited by Wythe Holt and L.H. LaRue, *Rewriting the History of the Judiciary Act 1789* (Norman; University of Oklahoma Press, 1990), 148.

⁷³ An Act for the Punishment of Certain Crimes against the United States in Richard Peters (ed.), *The Public Statutes at Large of the United States*, vol.1 (Boston: Charles C. Little & James Brown, 1845), 112-119. This volume also contains the Regulations for the Collection of Duties on Tonnage and Merchandise (p. 28) and the Act for Appropriations for the Support of Government (p. 95), examples of essential legislation competing for the attention of Congress.

The direction in section 34 of the Judiciary Act 1789 to apply state laws to disputes in the federal courts was extremely difficult to comply with because no state at that time had judges who wrote opinions or reporters to record the spoken words. Some states had no statute codes; others had codes which were incomplete. When in 1785 the states were asked to supply copies of all of their statutes to Congress and to the other states they were unable to comply. This meant that the Supreme Court justices began their circuit riding without copies of the local statutes.⁷⁴ However, in time, the states formalized court hierarchies and established supreme courts with appellate jurisdictions whose opinions were reported, and the statutes of states' legislatures were printed, enabling federal judges to consult state laws when forming their opinions. In the meantime they had little choice but to look to English law for guidance, as the following brief overviews demonstrate. A more detailed examination of how each justice found his way will appear in the following chapters.

Justice Washington was one who drew heavily on state laws. Pennsylvania law reports were certainly available by the April 1803 term in Philadelphia when he set aside an arbitration award relying on the opinions of the Chief Justice of the Pennsylvania Supreme Court and the President of Pennsylvania Court of Common Pleas.⁷⁵ An examination of all of Justice Washington's circuit opinions show him to be a judge who relied heavily on the opinions of the Pennsylvania superior courts. He expressed his confidence in state sources when writing, 'Although not bound by their decisions, they are and ought to be highly respected.'⁷⁶ He admitted being led into error in one case by relying too much on an opinion of the Pennsylvania chief

⁷⁴ Ritz. 50-51.

⁷⁵ *Hurst v. Hurst*, 12 F. Cas. 1028 (April, 1803).

⁷⁶ *Barnes et al. v. Billington et al*, 2 F. Cas. 858 (April 1803).

justice.⁷⁷ However, the reported circuit opinions of Justice Livingston show almost no reliance on state court opinions. A feature of his reported opinions is the absence of citations. Many of his cases are resolved by findings of fact rather than by points of law. The absence of citations may be due to poor reporting as many of his opinions are summaries in the third person, but it may be that, like Marshall and unlike Story, he preferred not to cite cases.

Justice Smith Thompson regularly relied upon state court opinions. It was to be expected that the opinions of the New York Supreme Court would loom large in his federal circuit jurisprudence as he had been an associate justice and later chief justice, serving on that court for sixteen years before his appointment to the nation's highest tribunal. A good example of his reliance on state supreme court decisions is his lengthy opinion in *Vermont v. The Society for the Propagation of the Gospel* (1827) in which he cited no less than twenty-four New York state opinions.⁷⁸ He, like Story, preferred to support his opinions with cited cases, and his practice was made easier by the meticulous reporting of William Johnson, New York State's first official law reporter. Unlike the reports of Thompson's federal circuit opinions, Johnson's reports were verbatim transcripts of the opinions delivered and, therefore, much more useful as precedents because the arguments and reasoning were readily apparent.

In the first circuit opinion of Justice Story reported in the *Federal Cases*, his reliance upon state opinions is clear. In that one case turning on the liability of a common carrier, he cited three opinions of the Supreme Court of the Commonwealth of Massachusetts, two opinions from William Johnson's New York Supreme Court

⁷⁷ *Hylton v. Brown*, 12. F. Cas. 1122 (October, 1805).

⁷⁸ *Vermont v. The Society for the Propagation of the Gospel*, 28 F. Cas. 1155 (1827).

reports, and one opinion of the New Hampshire Superior Court of Justice.⁷⁹ Story's circuit cases between 1811 and 1835 show frequent favourable citations of state opinions. It is apparent from surviving federal circuit opinions that the views of state superior courts were important sources to the justices in those early years. They looked for guidance, not only to the superior courts of the states comprising the circuits upon which they sat but also to the state court opinions of other states as is demonstrated in the above example of Justice Story's opinion in *Citizens Bank v. Nantucket Steamboat Co.*

The circuit opinions of the justices, save for Justice Livingston, show a greater dependence on English law than the assistance afforded by the state superior courts. The lawyers of the early Republic, whether attending university, the Inns of Court in London, or serving as clerks in lawyers offices, had been trained on the principles of the English common law. They had been brought up on a diet of *Blackstone's Commentaries on the Laws of England*, *Littleton on Coke*, and the major decisions of prominent English jurists. It was, therefore, likely that the justices would lean heavily on English law in the absence of United States statute and case law, despite an understandable resistance to the use of English statutes and cases to resolve American disputes, given the suffering under colonial rule before and during the Revolutionary War. A New York law of 1786 declared that the common law was in force in the state but the only English statutes to be applied were those recognized by the colony on April 9, 1775. Yet twelve years later that state prohibited the citation of any such statutes in the state courts and, to complicate matters, in 1833, a

⁷⁹ *Citizens Bank v. Nantucket Steamboat Co.*, 5 F. Cas. 719 (1811).

New York court held that certain English statutes had become part of the common law and, as such, were receivable in court.⁸⁰

In 1807 Kentucky went beyond the New York restrictions by banning outright the citation of any English cases decided after the commencement of the Revolution. The following year the chief justice of the Kentucky Court of Appeals enforced the prohibition by refusing counsel permission to read from the report of an English case decided five years earlier.⁸¹ The fear of some states that their legal systems were in danger of being unduly influenced by their former rulers did not extend to the reception of English law in the federal court, whether district, circuit or Supreme Court. On the contrary, the federal court reports show a widespread acceptance of English law by the justices provided it did not infringe the Constitution or existing United States law. This was so to the end of the Marshall Court era despite the great increase in Supreme Court opinions to guide the justices. However, the imported English law had to be relevant and adapted to the needs of many ordinary American citizens who, unlike their European counterparts, had much greater opportunities to purchase land and establish businesses in a country expanding geographically and economically.

As will appear in Chapter Two, Justice Washington relied heavily on English law throughout his time on circuit. In his very first sitting in Philadelphia in the April 1803 term he was very disappointed to find that there were no English authorities on the point.⁸² This is a theme which runs through his circuit opinions. He relied frequently on the decisions of Lords, Coke, Stowell, Ellenborough, and his

⁸⁰ See Friedman, Lawrence M., *A History of American Law* (New York: Simon & Schuster, 1973), 93-100 for a discussion of the tensions created by the use of English law.

⁸¹ *Ibid* 98.

⁸² *Dusar v. Murgatroyd*, 8 F. Cas. 140 (1803).

particular favourite Lord Mansfield. The *Federal Cases* reveal Washington's reliance on legal precedent to support his opinions, and the manner in which he searched for sources. Justice Livingston's approach to the use of English decisions differed markedly from Washington's practice. Despite having English authorities cited to him by counsel in argument, Livingston often handed down opinions devoid of or with minimal reference to precedent. Livingston expressed high regard for the authority of an English judge in only one of his reported opinions when he referred to Chief Baron of the Exchequer Comyn as 'an authority in himself.'⁸³ He followed English law or practice in only two of his reported cases. In one case he refused a continuance because the affidavit failed to give the name of the missing witness in accordance with the English practice.⁸⁴ In the other he followed decisions of Sir William Scott and Lord Mansfield on an admiralty point.⁸⁵ However, as will be observed from Chapter Three, there are examples of a determination to oust English law in favour of American law and his opinions disclose a certain pride in and a distinct preference for the emerging body of United States law.

Joseph Story's opinions were erudite and displayed a willingness to review the law from all possible sources, and from English law in particular. He made this plain in his first term of the Massachusetts circuit court. He was delighted when he found that his own view of a case had been confirmed by a recent English case 'where the subject was very elaborately considered by Lord Denman.' In the same case he cites with approval a treatise on shipping by Lord Tenterden and a decision of Mr Justice Dampier.⁸⁶ The following year in an embargo case, Story followed a

⁸³ *Slocum et al. v. Hathaway*, 22 F. Cas. 339 (1820).

⁸⁴ *Smith v. Barker*, 22 F. Cas. 956 (1808).

⁸⁵ *The Grand Turk*, 10 F. Cas. 956 (1817).

⁸⁶ *Citizens Bank v. Nantucket Steamboat Co.*, 5 F. Cas. 719, 729 (1811). The case turned on the liability of the owners of a steamboat as common carriers of bank bills.

doctrine of Lord Hale declaring that there could not be any better authority.⁸⁷ These two cases early on in Story's judicial life reveal an eagerness to rely upon the English authorities and his opinions in the *Federal Cases* show that this was so throughout his time on the First Circuit. His respect for the English authorities never diminished.

In 1825 in a circuit court case involving the court's power to order amendments at common law and by statute, Justice Thompson considered in detail the practice of English judges on amendments, English statutes from Edward III to George I and the decisions arising under them, analogous to United States statutes.⁸⁸ Again, the *Federal Cases* show that Thompson regularly relied upon English decisions through to the end of the Marshall Court in 1835 when he had to decide whether admiralty had jurisdiction in an action for salvage for the retaking on land of property captured by pirates, and called in aid Lord Hale's construction of a statute of Henry VIII.⁸⁹ It follows, therefore, that, Livingston apart, the four justices were eager to use English law to help them resolve their circuit cases.

That justices generally looked to the same sources for legal precedents meant that they were more likely to achieve consistency of decision making across the circuits. This need for consistency had been recognized before the Judiciary Act of 1789. Supreme Judicial Court Justice David Sewell wrote to the newly elected Senator for Massachusetts, Caleb Strong that 'a certain uniformity of decisions throughout the United States whether in the federal or State Courts, is an object that may be worthy of consideration.' Sewell would soon have a more than casual

⁸⁷ *The Bolina*, 3 F. Cas. 811, 812 (1812).

⁸⁸ *Smith v. Jackson*, 22 F. Cas. 576, 577-578 (1825).

⁸⁹ *Davidson v. Seal-Skins*, 7 F. Cas. 192, 194 (1835).

interest in the concept of uniformity as he was shortly to be appointed a federal district judge for Massachusetts.⁹⁰

Justices not only looked to state law and English law for guidance. Wherever possible they followed each other's circuit opinions. Justice Washington followed a circuit opinion of Justice Story; a course which was subsequently affirmed by the Supreme Court in an opinion delivered by Justice Story.⁹¹ Washington again followed an opinion of Justice Story in a patent case.⁹² In a case involving the circulation of banknotes, Washington followed not only one of his own circuit opinions but also an opinion from the circuit court of the District of Columbia.⁹³ Washington held Chief Justice Marshall in the highest regard and in 1827 relied upon Marshall's opinion on the admissibility of evidence in the trial for treason of former Vice-President Aaron Burr, which Washington used in a counterfeiting trial on circuit.⁹⁴ He also valued the opinion of Justice Todd and followed his opinion in a Kentucky banking case, expressing himself entirely satisfied and concurring entirely with Todd's view of the law.⁹⁵ Thus Washington sought consistency by following the circuit opinions of his brethren despite the fact that they were not binding upon him.

Justice Livingston also wished for consistency of decisions across the nation and would look to the decisions of his brethren on circuit to achieve this objective. In 1810 in New York when trying an alleged breach of the embargo, he expressed

⁹⁰ Letter, David Sewell to Caleb Strong, March 28, 1789 (Caleb Strong Manuscripts, Forbes Library, Northampton, Mass.). Reprinted in Wythe Holt, 'To Establish Justice: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts,' *Duke Law Journal*, vol. 6 (1989), 1421-1531, 1529.

⁹¹ *Evans v. Hettick*, 8 F. Cas. 861 (1818). Affirmed, 7 Wheat. (20 U.S.) 453 (1822).

⁹² *Treadwell et al. v. Bladen*, 24 F. Cas. 144 (1827). Story's opinion was in *Goodyear v. Matthews* (Case No. 5576, F. Cas.).

⁹³ *Martin v. The Bank of the United States*, 16 F. Cas. 885 (1821).

⁹⁴ *United States v. Moses*, 27 F. Cas. 5 (1827).

⁹⁵ *Bank of the United States v. Northumberland Union and Columbia Bank*, 4 Peters 108 (1821).

his high regard for the opinions of Justice Washington writing that they ‘would always receive the most respectful consideration from this court.’⁹⁶ He did, however, point out the difficulties he sometimes faced when opinions from other circuits were cited to him because of the absence of a full report which meant he was unable to discern the arguments advanced and the reasoning behind the opinion.⁹⁷ A justice was unlikely to follow the fact of a decision of another court without knowing the basis of the opinion and so the absence of accurate and available law reports did hamper but did not defeat the justices’ desire for uniformity of opinions. In the same year in another embargo case this time in Connecticut, Livingston held over the amount of penalty because he wanted to learn the practice in the circuit courts of New York and Virginia where similar actions had been brought.⁹⁸ This is another example of a justice looking to the wider picture, concerned not merely to establish patterns on his own circuit, but determined to achieve, as a member of a team, nationwide uniformity of law and practice.

In *Adams v. Story* (1817), Livingston acknowledged the right of each state to pass insolvency and bankruptcy laws but made the point that in a country as extensive as the United States, those laws should be uniform, so that none of the larger ‘commercial’ states should be without a code on the subject. He believed that Congress should determine such a uniform plan displacing state legislation. He also expressed regret that the issue had not yet received a decision of the Supreme Court which would have ‘produced a uniformity of judgment, at least in the courts of the United States.’⁹⁹ Although Justice Story was a staunch supporter of consistency

⁹⁶ *The Enterprise*, 8 F. Cas. 732, 736 (1810).

⁹⁷ *Ibid.* 736.

⁹⁸ *United States v. Allen*, 24 F. Cas. 772 (1810).

⁹⁹ *Adams v. Story*, 1 F. Cas. 141, 148. (1817).

across circuits the *Federal Cases* reveal that he rarely cited circuit opinions other than his own.

Justice Smith Thompson was also keen to follow the circuit opinions of the other justices where appropriate. There are numerous examples of this in the *Federal Cases*. Justice Story was a particular favourite. He followed Story in *The Mary* (1824) and in *United States v. Sturges et al.* (1826). In the latter case he made express reference to the importance of consistency when he wrote, ‘By finding the point directly adjudicated upon in one of the courts of co-ordinate jurisdiction with this, I shall adopt it as governing the present case. It is of the highest importance that there should be uniformity of decision in the construction of statutes.’¹⁰⁰ Further, in 1829, when holding that the federal courts had power to make rules of practice under the Judiciary Act 1789, Thompson followed two circuit opinions - those of Justices Washington and Story.¹⁰¹

Lest it be thought that all justices were eager to follow other opinions, Justice William Johnson was not always so co-operative. He was, on occasion, unwilling to accept even the authority of the Supreme Court. In a dissent in 1828 Johnson angrily complained when the majority held that the circuit court in a trial by jury had no power to compel a plaintiff to submit to a non-suit, i.e. to force a plaintiff to abandon his claim against the defendant. Johnson protested against ‘the right of forcing upon my circuit, the practice of other circuits,’ pointing out that ‘I can never know the practice of my own circuit until I come here to learn it.’¹⁰² Justice Johnson’s attitude in no way undermines the overwhelming ethos of uniformity. Clearly he was unhappy that a practice which had adopted on his circuit was not one which the

¹⁰⁰ *The Mary*, 16 F. Cas. 938, 941; *United States v. Sturges et al.*, 27 F. Cas. 1358, 1362 (1826).

¹⁰¹ *Koning v. Bayard Jr. et al.*, 14 F. Cas. 843, 845.

¹⁰² *Doe on the Demise of Elmore v. Goymes*, 26 U.S. (1 Pet.), 469.

Court could endorse. One question which divided the justices on circuit and which did not advance consistency was whether United States law recognized a common law of crime. This is an issue which will be investigated fully in Chapter Four.

Consistency was also achieved by conversations between justices when together in Washington and by correspondence when apart on circuit. This exchange of information was crucial to the decision making process. Collegiality was vital to the decision making process of the Court. It also had a large part to play in relation to circuit business. The justices boarded in the same lodging-house in Washington which facilitated their ability to decide cases promptly as they discussed the day's oral arguments and often reached decisions during the evening. This collegiality engendered a spirit of friendship and co-operation which is revealed in Story's letters to Nathaniel Williams and Samuel Fay set out in the Introduction to this research and is also shown in the correspondence between justices exchanging circuit news and seeking and receiving advice on difficult points of law.

John Marshall was eager and pleased to receive help from his colleagues on topics with which he was unfamiliar or in respect of troubling cases likely to attract much public interest such as the trial on circuit in 1807 of former Vice-President Aaron Burr for treason.¹⁰³ Marshall's plea to Cushing in that case was not an isolated request for assistance. There are numerous examples of such requests, usually addressed to Washington and Story on unfamiliar topics, mainly on admiralty points but also on debt, forfeiture and insolvency, revealing his wish for consistency across the circuits.¹⁰⁴

¹⁰³ Letter, John Marshall to William Cushing, June 29, 1807, *Papers of John Marshall*, vol. VII, 60-62.

¹⁰⁴ Letter, John Marshall to Bushrod Washington, May 25, 1813, *Papers of John Marshall*, vol. VII, 390: Letter, John Marshall to Bushrod Washington, May 31, 1819, *Papers of John Marshall*, vol.

It must not be thought that Marshall was the only justice who sought help with difficult circuit cases. He gave advice to Justice Washington in a bankruptcy case in 1814.¹⁰⁵ Story and Washington advanced uniformity by exchanging what G. Edward White (1988) describes as semi-annual reports of new and interesting cases they had decided on their respective circuits. White believes that Marshall, Story and Washington were keen on ‘shaping federal Law,’ and this argument is borne out by their correspondence.¹⁰⁶ These exchanges of information and the answering of calls for help furthered the justices’ aim of uniformity.

Uniformity necessitated working together on circuit as well as in Washington to strive, by using law from a variety of sources, and, by following wherever possible the circuit opinions of their colleagues, to achieve that crucial consistent approach to the resolution of civil and criminal proceedings. It was important that citizens, whether they were farmers, manufacturers, inventors, landowners, ship-owners, or corporate bodies, could order their business and domestic affairs in such a way as to feel reasonably confident that they would receive the same protection under federal law in every state of the Union. There was little point in establishing federal courts whose law and procedure differed from circuit to circuit in the same way as the courts of the several states. If the system was to work, it was the task of the justices to assure the people and crucially the business community that, no matter

VIII, 315: Letter, John Marshall to Joseph Story, July 13, 1819, *Papers of John Marshall*, vol. VIII, 352. These are examples of ten such requests for help which have survived to the *Papers of John Marshall*.

¹⁰⁵ Letter John Marshall to Bushrod Washington, April 19, 1814, *Papers of John Marshall*, vol. VIII, 34-35.

¹⁰⁶ G. Edward White, *The Marshall Court and Cultural Change*, 348-349 citing a letter from Washington to Story setting out a summary of his circuit cases from the last term and indicating that he was anxious to receive Story’s report in return. Letter, June 19, 1821 in the Joseph Story Papers, Massachusetts Historical Society, Boston.

where they lived, worked or travelled, the federal courts would implement the law in a uniform manner across the nation.

Conclusion

The federal judicial system had troubled beginnings. From the outset Federalists had to contend with determined political opposition at the Constitutional Convention, various ratification conventions and the debates during the passage of the Judiciary Act 1789. Whilst the Act successfully negotiated the Congress, reasonable Republican fears remained that a federal judiciary would so interpret the Constitution so as to strengthen the power of central government at the expense of state sovereignty.

President Washington's nomination of Supreme Court justices who were notable and experienced lawyers from different parts of the country and who had played a significant role in the ratification of the Constitution went a long way towards ensuring a positive reception of federal law regionally. Local people were more likely to accept the concept of federal justice if judges visited the main cities on circuit so that they might observe, first-hand, federal justice at work, or read of the justice's activities in the local press.

The justices had a dual function on circuit: judicial and political. First, they administered criminal law and tried civil claims. Second, they promoted the concept of federal government locally, attempting to forge a bond between government and citizen using the grand jury charge at the beginning of each circuit session to extol the virtues of the Constitution and the institutions it had established. The reception the charge met depended very much on where it was delivered. That political

element of the charge was much in evidence during the first decade of the federal courts, but after its misuse by Justice Chase leading to his impeachment in 1804, the charge was used merely to direct the grand jury on the law relating to matters relevant to the cases they were to try.

The Alien & Sedition Acts of 1798, which were rigorously enforced by the federal judiciary, were ostensibly designed to combat revolutionary fervour arising from events in France but were used to restrict criticism of the Federalist government. Those unpopular measures resulted in the Republican-led Virginia and Kentucky Resolutions of 1798 and 1799 asserting the right of states to disregard federal legislation which they deemed unconstitutional. This heavy-handed statutory denial of freedom of speech and of the Press was a factor in the defeat of President John Adams and the election of President Jefferson in 1801 and did little to advance the popularity of the federal justices.

The justices realized how vulnerable they were when President Jefferson repealed that part of President Adams' 1801 Judiciary Act creating sixteen 'Federalist' circuit judges, thereby restoring the justices' circuit riding duties. The 1802 Act also suspended sittings of the Supreme Court for over a year. Whilst the Court in 1803, in *Marbury v. Madison*, asserted the power to judicially review acts of Congress, the justices generally kept a low profile, avoiding a direct confrontation with President Jefferson as was demonstrated by their meek acceptance in, *Stuart v. Laird*, of the reintroduction of circuit riding. The actions of a powerful majority in Congress held in check, certainly during President Jefferson's two terms, the Court's desire to play a more active role in government.

The justices went on circuit with no specific guidance as to the approach they should adopt to achieve the uniform system of federal law and procedure essential to the stability of the emerging nation. They were left very much to their own devices. They did not start with a clean slate because many years of British rule had left their mark on the legal systems of individual states. There were few Supreme Court opinions and hardly any federal statutes to guide them so they looked to other sources to fashion American law pending a greater output of federal legislation and Supreme Court authorities. In the meantime, they looked for uniformity in the decisions of state supreme courts, each other's circuit opinions, and, particular, the English common law. Consistency was achieved by exchanges of ideas when together in Washington and by writing to each other on circuit seeking help on unfamiliar branches of law together with the exchanges of semi-annual reports of interesting cases between Justices Washington and Story. In this way the justices achieved the uniformity of law and procedure essential to the stability of the vast areas administered by the federal government.

Chapter Two

Bushrod Washington: The Role of Precedent and the Preservation of Federalism Ideology

Joseph Story's eulogy at the death of his close friend and colleague Bushrod Washington contained a description of him as 'a good old fashioned Federalist' with a 'cautious mind' who was 'distinguished for moderation.' Story added,

He indulged not the rash desire to fashion the law to his own views... Hence, he possessed the happy facility of yielding the just the proper weight to authority; neither, on the one hand, surrendering himself to the dictates of other judges, nor, on the other hand, overruling settled doctrines upon his own private notions of policy or justice.¹

It was appropriate that Justice Story should touch upon the part played by legal precedent in Washington's jurisprudence because it is a doctrine apparent even from a cursory examination of his circuit and Supreme Court opinions. District Judge Joseph Hopkinson's eulogium on Washington was similarly even handed by praising Washington as 'respectful of the authority of decided cases but equally careful and discriminating in applying them.'² However, an in-depth analysis of those opinions reveals, not the delicate balance suggested by Story and Hopkinson, but a constant search for precedent for guidance as to what his opinion should be, and a feeling of unease when having to break new ground. Nevertheless, the eulogies are a useful starting position from which to open up the debate about the source of legal authority in the early Republic and invite an investigation to reveal this justice's part in the creation, on circuit, of a uniform body of federal law and procedure.

The chapter focuses on Washington's role in the shaping of American law which had its foundation in the expertise he gained whilst presiding over the United

¹ Joseph Story, Eulogy on Justice Washington, December 1829 in W.W. Story, *Life and Letters of Joseph Story*, vol. 2, 29-33.

² Joseph Hopkinson, *In Commemoration of the Hon. Bushrod Washington, Late one of the Justices of the Supreme Court of the United States* (Philadelphia: T.S. Manning, 1830), 16.

States Third Circuit between 1803 and 1829. Its main thrust involves an examination of the thread touched upon by Justice Story which had an important place in Washington's jurisprudence; his belief in the need for uniformity which flowed from adherence to legal precedents. By far the most important factor in Washington's jurisprudence was his strict application of this doctrine of precedent. A conservative Federalist he upheld existing property rights and endeavoured to secure the nation's economic prosperity by promoting interstate and international trade. This aspect of Federalist philosophy was a significant stabilizing factor in which precedent featured strongly. This quest for uniformity, the preservation of property rights, and the advancement of trade will be demonstrated by an analysis of his circuit court and Supreme Court opinions. His work on circuit has been largely neglected by scholars despite the fact that the opinions are far more numerous than his Supreme Court majority holdings and, therefore, admit of a greater insight into his jurisprudence and political outlook. Two further aspects of his jurisprudence are highlighted, namely his personal and judicial approach to the issue of slavery and the way in which he dealt with the tension between central government powers and state sovereignty.

A Federalist's Journey from Revolutionary Virginia to the Supreme Court

Bushrod Washington was born into the colonial aristocracy in Bushfield, Virginia on June 5, 1762. His father, John, was President George Washington's younger brother and his privileged position enabled him to send his son to the prestigious William and Mary College from which he graduated A.B. in 1778. He also studied law at the college, attending the lectures of George Wythe, and met John Marshall; the beginning of a lifelong friendship at the Bar and on the Supreme Court Bench.

Having enlisted as a private during the Revolutionary War, Washington witnessed the surrender of General Cornwallis at Yorktown. After the War, supported financially by his uncle, he studied law in Philadelphia in the offices of James Wilson who was to be one of President Washington's first appointees to the Supreme Court. Washington began his law practice in Westmoreland County, Alexandria and later moved to Richmond specializing in chancery cases. Politically active in the Federalist cause, he was elected to the Virginia House of Delegates in 1787, supporting the adoption of the Constitution at the ratification convention the following year.

Despite stiff competition in Richmond from outstanding advocates such as John Marshall and Patrick Henry, Washington's practice grew. His own *Virginia Court of Appeals Reports* reveal that between 1792 and 1796 he had appeared as counsel in approximately one quarter of the 149 reported cases. Having acted in several matters for his uncle, his reputation was such as to persuade Thomas Jefferson to instruct him in a chancery suit. Horace Binney, a noted advocate, described Washington's practice at the Bar as mainly on the Chancery side with a good grounding in common law, but no experience of commercial law or jury trials.³

Justice Washington was a deeply religious man, a life-long member of the Episcopal Church of the United States, leading morning and evening prayers at Mount Vernon. Binney believed that Washington was sustained in his private life and public duties by a constant observance of his religious beliefs.⁴ Washington had been active on behalf of his church as an advocate, successfully resisting Virginia's attempts to seize church lands.⁵ He was also a vice-president and charter member of

³ Horace Binney, *Bushrod Washington* (Philadelphia: C. Sherman & Son, 1858), 11-12.

⁴ *Ibid*, 27.

⁵ Blaustein & Mersky, 247.

the American Bible Society, attending its meetings, and taking an interest in its work.⁶ Casper (2008) believes that it was Washington's religious beliefs which led him to become President of the American Colonization Society in 1816, committed to create African colonies of free American blacks. In 1820 Washington explained the objects of the Society as 'an instrument in the conversion of Africans to Christianity' in order to establish 'the kingdom of the Messiah in every quarter of the globe.'⁷ The venture was open to the criticism that the objectives were impossible in view of the large numbers involved or that it was a device to rid the nation of potentially troublesome freed slaves.⁸

Washington did not find his deep religious convictions incompatible with his ownership of slaves, whom he regarded as property to be disposed of as and when he thought fit. Like Justice William Johnson of South Carolina, he was born into a slave-owning family and inherited the family plantation and 42 slaves from his father in 1787.⁹ The following year he wrote to his uncle informing him that he had resolved to give his full attention to his law practice which meant that he intended to sell the plantation and the slaves who tended the land. He used the sale proceeds to discharge part of the debts he had also inherited.¹⁰ When he inherited Mount Vernon from his uncle in 1802, Washington brought with him those slaves he had retained who would have been domestic servants as the plantation had been sold. George

⁶ Bushrod C. Washington, 'The Late Mr Justice Bushrod Washington,' *The Green Bag*, vol. IX, No. 8 (Boston, August 1897), 334.

⁷ Scott E. Casper, *Sarah Johnson's Mount Vernon* (New York: Hill and Wang, 2008), 13-15. Citing Bushrod Washington, 'The People of Color,' *Niles Weekly Register* 11 (January, 25, 1817), 355-356, and Adam Hodgson, *Letters from North America* (London: Hurst, Robinson & Co., 1824), 15-17.

⁸ According to the United States Census Bureau, the 1810 census revealed that out of a total population of 5,660,067, there were living predominately in the Southern States 1,005,685 slaves and 167,691 'free non-whites.' http://faculty.weber.edu/kmackay/statistics_on_slavery.htm (Accessed 21/04/2014).

⁹ Donald Morgan, 'William Johnson' in Friedman & Israel, *Justices*, 356.

¹⁰ Letter, Bushrod Washington to George Washington, November 20, 1788. Mount Vernon Archives cited in Annis, 56-57.

Washington had declared that the 123 slaves he owned were to be freed upon the death of his wife Martha. However, Bushrod Washington persuaded Martha to free them immediately because of security concerns. Despite being granted freedom, many of the slaves remained at Mount Vernon where food, clothing, shelter, and medical care were available.¹¹ They had little choice in the matter given the near impossible prospect of independent living.

In 1821 Washington sold fifty-four of his slaves from Mount Vernon to pay for losses incurred in the running of the estate. The story of the sale appeared in the influential Baltimore newspaper *Niles Weekly Register* which criticized him for selling the slaves as if they were ‘hogs or cattle’ and accusing him of dividing families. Washington’s reply in the *Baltimore Federal Republican* revealed the mind-set of the typical Virginia slave-owner and denied the right of any person to question his legal or moral right to sell his property. He did not feel obliged to free his slaves just because his uncle had done so and Justice Washington did not free his slaves in his will.¹² Despite expressing an abhorrence of the slave trade, Washington’s opinions examined later in this chapter reveal a pattern of upholding the rights of the ‘owners’ of those slaves already held in bondage in the United States.

Justice Washington and the Role of Precedent in the Federal Legal System

Washington’s pre-occupation with case law was first apparent from his compilation of two volumes of Virginia Court of Appeal case reports in the early

¹¹ Annis, 202.

¹² Annis, 198-203.

part of his law practice.¹³ He compiled them for his own use for citing in court and not with a view to publication.¹⁴ The most striking aspect of Justice Washington's jurisprudence is his search for and reliance upon the doctrine of precedent which is best illustrated by his circuit opinion in *United States v. Bright* (1809) when he wrote,

Miserable indeed, must be the condition of the community where the law is unsettled, and decisions on the very point are disregarded, when they come up again, directly or incidentally into discussion... There is no standard by which the rights of property, and the most estimable privileges to which citizens are entitled, can be regulated.¹⁵

This observation reveals his vision of a federal legal system founded upon the strict adherence to precedent to ensure that citizens would have some idea of the prospects of success in litigation as well as knowing their rights and obligations under the law. The preservation of 'rights of property' and 'privileges' as well as the promotion of commerce loomed large in Federalist philosophy and is a common theme in the opinions of all four justices.

Blackstone, in 1765, in the first volume of his *Commentaries* spoke of 'the rule of precedent as one of general application,' and 'an established rule to abide by former precedents, where the same points come again in litigation.' Precedent was essential because it secured stability in the law.¹⁶ In 1788, Alexander Hamilton also believed that judges should be bound by strict rules and precedents defining their duty in every case they tried. He anticipated a large volume of precedents which would require men of skill and integrity to master so many opinions. This was an argument supporting security of tenure for the few who would undertake such an

¹³ Bushrod Washington, *Reports of Cases Argued and Determined in the Court of Appeals of Virginia*, 2 vols. (Richmond: Nicholson, 1798).

¹⁴ Charles F. Hobson, 'St. George Tucker's Papers,' *William and Mary Law Review*, vol. 47, issue 4, Article 6 (2006), 1250-1251.

¹⁵ *United States v. Bright*, 24 F. Cas. 1235 (1809).

¹⁶ William Blackstone, *Commentaries on the Laws of England*, First ed., vol. 1 (Oxford: Clarendon Press, 1765-1769), 69-70.

arduous position. It would have been a difficult, if not an impossible task, for a federal justice to assimilate a large body of authorities if his tenure was fixed for a short term, or determinable at the will of the legislature or electorate.¹⁷

Achieving a balance between precedent as a crucial element of stability and the injustice which might flow from the slavish adherence to a doubtful authority is a question which has troubled judges since the early days of the federal judicial system. Any prior decision which is prima facie absurd or is shown by subsequent evidence to have been based on a false premise must be reviewed. However, the re-examination of a case without a compelling reason cannot be justified. The difficulty lies in drawing the line. Justice Thurgood Marshall identifies the certainty which results from adherence to precedent in his dissent in *Payne v. Tennessee* (1991), expressing the view that fidelity to precedent was fundamental ‘to a society governed by the rule of law...if governing standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will.’ He argues that if the doctrine of precedent was weakened, it would destroy the Court’s power to resolve disputes between those with power and those without.¹⁸

Lee (1999) examines how the doctrine of precedent was applied in the Marshall Court. He found a tension between the importance of following past decisions to preserve stability and certainty in the law and the common law declaratory theory which permitted some examination of the prior decision. He concludes that the general approach of the Marshall Court was that it sought to resolve the tension by a strong presumption in favour of precedent and a limited

¹⁷ Alexander Hamilton, Federalist Paper No. 78 (The Judiciary Department) in Rossiter, *The Federalist Papers*, 470.

¹⁸ Cited in Harold J. Spaeth & Jeffrey Segal, *Majority Rule or Minority Will* (Cambridge: Cambridge University Press, 1999), 6-7.

notion of the right to correct past errors.¹⁹ Lee highlights Washington's deference to precedent in *Ogden v. Saunders* (1827). Some eight years earlier in *Sturges v. Crowninshield*, Washington had concurred in an opinion which had upheld the power of state legislatures to pass bankruptcy laws even though he believed that that power was vested exclusively in Congress. He did so quite simply because he believed that dissent weakened the authority of the Court. When the point arose again in *Ogden*, Washington felt compelled to follow *Sturges* even though his private view of the correctness of the original opinion had not altered.²⁰

The examination of Washington's opinions which follow, support the view that Washington's approach to precedent was more akin to submission than a 'deference' to the doctrine, even though, on occasion, he anticipated it might result in an injustice as he acknowledged in *Scriba v. Insurance Co. of North America* (1807) when declaring, 'We have nothing to do but pronounce the law without considering how it may affect the parties on either side.'²¹ He took the same line in *Kirkpatrick v. White et al.* (1826) holding that he had no option but to follow the rules of law and equity and refuse jurisdiction, again stressing that it was not for him to consider the consequences of his decision.²²

His opinions also demonstrate a strict and restrictive approach to the application of statutory interpretation; all flowing from a philosophy in which caution and the preservation of the status quo outweigh the risk of an innovative

¹⁹ Thomas R. Lee, 'Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court,' *Vanderbilt Law Review*, vol.52 (1999), 666-686.

²⁰ *Ibid.* 673. *Sturges v. Crowninshield*, 17 U.S. 122 (1819). *Ogden v. Saunders*, 25 U.S. 213 (1827).

²¹ *Scriba v. Insurance Co. of North America*, 21 F. Cas. 874. Penn. October, 1807.

²² *Kirkpatrick v. White et al.*, 14 F. Cas. 685. Penn. April, 1826. See also for more examples of Washington's seemingly indifferent attitude to the consequences of his opinions. *Beardsley v. Torry*. 2 F. Cas. 1188. Penn. October 1822 and *New Jersey v. Babcock*, 18 F. Cas. 82, New Jersey, April 1823.

solution meeting the justice of a case. Justice Story's description of Washington as a man with a 'cautious mind' who was 'distinguished for his moderation' accurately summarized his colleague's jurisprudence. Whilst deference to precedent has the obvious benefit of making future decisions more predictable, a too rigid approach to the doctrine may perpetuate injustice. Duxbury (2008) suggests that 'constant recourse to precedent might indicate that a decision maker has few or other solutions at his disposal [or] might betray a fondness for the easy option or an unwillingness to think seriously about what is at stake.'²³ Duxbury's comments would seem to fit Washington's approach to precedent rather well.

Washington displayed such a rigid approach to precedent in *Croudson & Ors. v. Leonard* (1808) when, relying on English authorities, he held that the sentence of a Barbados admiralty court condemning a vessel and cargo was conclusive evidence against the insured, proving that he had falsified his warranty of neutrality, thereby forfeiting his insurance cover. He believed that he was bound by the legal principle which upheld the decisions of all admiralty courts of competent jurisdiction, despite accepting that such a strict adherence to precedent might prove oppressive to citizens of neutral nations; he felt it was a matter for government to remedy the mischief not the judges.²⁴ Because it is not possible to detect a general judicial philosophy from just two Supreme Court opinions, this study examines all of his circuit court opinions searching for evidence revealing whether his strict adherence to *stare decisis* in *Ogden* and in *Croudson* were isolated examples of his practice or comprised a pattern of rigid reliance.

²³ Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008), 31.

²⁴ *Croudson v. Leonard*, 8 U.S. 434 (1808).

Washington looked to federal and state precedents to support his opinions on circuit, but his circuit reports reveal a significant reliance on the reported cases of the English judges, many of whom he held in the highest regard. He did, however, distinguish between English decisions pre and post the Revolution. In *Crawford et al. v. The William Penn* (1819) he rejected the Exchequer case of *Anton v. Fisher* because ‘it was decided long after our Declaration of Independence, and even after the treaty of peace; and is, therefore, not to be considered an authority in the courts of this country, so as to overrule the decision in *Ricord v. Bettenham* [an English case] in 1765.’²⁵ Washington again voiced respect for English law in *Barnes v. Billingham* (1803) commenting favourably on a federal court opinion which ‘was in perfect unison with the English decisions.’ Lord Mansfield was his particular favourite whom he followed wherever possible. In the bail case of *Bobyshall v. Oppenheimer* (1822) Washington wrote, ‘I choose to adhere to the long established rule recognized and confirmed by Lord Mansfield, in preference to the modern practice of the English courts; particularly as the rule of the supreme court of this state is not pretended to be different from that stated by Lord Mansfield.’²⁶

Washington once more praised Lord Mansfield in *Ferguson v. Zepp* (1827) when construing a will and followed Mansfield’s 1775 decision in *Hogan v. Jackson*, Cowp. 299 writing, ‘As these expressions have received a definitive judicial interpretation, by the highest authority, more than half a century ago, it can only be necessary to look to the authority itself for their meaning.’²⁷ It is indicative of Justice Washington’s high regard of English law that he should deem an English

²⁵ *Crawford et al. v. The William Penn*, 6 F. Cas. 781. New Jersey. October 1819.

²⁶ For a selection of favourable references to Lord Mansfield see, *Calbraith v. Gracy*, 4 F. Cas. 1030. Penn. April 1805. *Marshall v. Delaware Ins. Co.*, 16 F. Cas. 838. Penn. April, 1807. *Penn v. Klyne et al.*, 19 F. Cas. 166. Penn. April 1817. *Bobyshall v. Oppenheimer*, 3 F. Cas. 785. Penn. October, 1822. *Rhoades et al. v. Selin et al.*, 20 F. Cas. 631. Penn. October 1827.

²⁷ *Ferguson v. Zepp*, 8 F. Cas. 1154. Penn. April, 1827.

judge as ‘the highest authority,’ despite the fact the United States Supreme Court was in its thirty-ninth year and had by then handed down over a thousand opinions defining the shape of American law. Lord Mansfield was not the only English judge guiding Washington. He also looked for support from the precedents of Sir William Scott, Lords Ellenborough, Loughborough, Coke, and Sir William Blackstone.²⁸

Washington’s regard for the English authorities was not confined to case law. In *Krumbar v. Burt et al.* (1809) he wondered why the legislature of the United States had not taken from the English statutes the provisions regarding contingent interests in bankruptcy.²⁹ Further in *Hurst v. Hurst* (1807) he noted that the Pennsylvania Statute of Frauds was an exact copy of the English Statute of Frauds which entitled him to examine all the English decisions on the issue.³⁰

Even if English precedent was available to assist him, Washington also looked to the opinions of state superior courts to support the English authorities despite the fact that state decisions were merely persuasive authorities, observing in *Campbell et al. v. Claudius* (1817) that he had great respect for the opinions of the Pennsylvania Supreme Court and the Court of Common Pleas.³¹ He also followed decisions of the New York Supreme Court and the Court of Chancery and, particularly, James Kent,

²⁸ Examples of his reliance on these judges are; *Sperry v. Delaware Ins. Co.*, Penn. October 1808 (Ocean marine insurance, Sir William Scott); *King v. Delaware Ins. Co.*, 14 F. Cas. 516. Penn. October 1808 (Ocean marine insurance, Lord Ellenborough); *United States v. Colt*, 25 F. Cas. 581. Penn. April, 1818 (Embargo bond, Lord Loughborough whose opinion he preferred to that of Sir William Blackstone); *Ramdulollday v. Darieux*, 2 F. Cas. 211. Penn. April, 1821 (Promissory notes, Lord Ellenborough); *Field v. Joel Gibbs et al.*, 1 Peters 155. New Jersey. October 1815 (Conclusiveness of judgments, Lord Coke).

²⁹ *Krumbaar v. Burt et al.*, 14 F. Cas. 872. Penn. October 1809.

³⁰ *Hurst v. Hurst*, 12 F. Cas. 1031. Penn. April, 1803.

³¹ *Campbell et al v. Claudius*, 4 F. Cas. 1161. Penn. October, 1817; *Barnes et al. v. Billingham et al.*, 2 F. Cas. 858. Penn. April, 1803; *Hurst v. Hurst*, 12. F. Cas. 1031. Penn. April, 1803; *Kingston v. Kincaid et al.*, 14 F. Cas. 590. Penn, April 1806; *Hylton v. Brown*, 12 F. Cas. 1123. Penn. October, 1806; *Mott v. Maris*, 17 F. Cas. 905. Penn. April, 1808; *Talbot v. Simpson*, 23 F. Cas. 644. Penn. October, 1815; *Lanning v. London et al.*, 14 F. Cas. 1123. Penn. October, 1821; *Burton et ux. v. Smith*, 4 F. Cas. 876. Penn. October, 1826.

the eminent New York jurist.³² This reliance on non-binding state opinions adds further support to the argument that Washington was anxious to explore every avenue for material which might help him arrive at a conclusion. However, where there was a conflict between state procedure and the English practice, Washington preferred the latter. Thus, in *Craig* (1803) where at an early stage of the organization of the federal courts, the circuit courts had adopted a practice of the state courts based on the English practice, Washington held it improper to depart from the federal court practice because the state's practice had changed.³³

Washington also used the persuasive authority of his brother circuit judges. In an action for infringement of patent, Washington followed a circuit opinion of Justice Story and was affirmed on appeal, Justice Story writing the opinion of the Court.³⁴ He followed Story again in *Treadwell et al. v. Bladen* (1827), another patent case.³⁵ In *Martin v. Bank of United States* (1821) when Washington had to rule on the practice of cutting bank notes in half to send parts by different mail, he followed an opinion of the circuit court of the District of Columbia, holding that the bank could not refuse payment if all parts were produced.³⁶ In the counterfeiting trial of *United States v. Moses* (1827) Washington ruled that the arresting officer should not answer the defendant's request for the name of the informer as to do so would be prejudicial to the administration of justice by deterring persons from making disclosures of crime. He wrote that he was following a ruling made by Chief Justice

³² *Marshall v. Delaware Ins. Co.*, 16 F. Cas. 838. Penn. April, 1807; *Potts v. Gilbert*, 19 F. Cas. 1203. Penn. April, 1819; *United States v. Astley et al.*, 24 F. Cas. 875. Penn. October, 1819; *Ridgway v. Underwood*, 20 F. Cas. 760. New Jersey. October 1821; *Pendleton v. Evans*, 19 F. Cas. 140. Penn. October, 1823.

³³ *Craig*, Trenton, New Jersey, April 1803 in Peters, *Reports of Third Circuit Cases, 1803-1818*, vol. 1, 1.

³⁴ *Evans v. Hettick*, 8 F. Cas. 861. Penn. October, 1818. Affirmed in 20 U.S. 353.

³⁵ *Treadwell et al. v. Bladen*, 24 F. Cas. 144. Penn. October, 1827. Story's circuit opinion was *Goodyear v. Matthews*, Case no. 5578 in F. Cas.

³⁶ *Martin v. Bank of United States*, 16 F. Cas. 885. Penn. October 1821.

Marshall in the Virginia circuit court during the trial for treason of former Vice-President Burr.³⁷ This research has identified only one case in which Washington disagreed with a colleague's circuit opinion. In *Beach v. Woodhull* (1803) despite holding a New Jersey Act to be retrospective and unjust in its operation, Washington nevertheless upheld it because it did not infringe the Constitution. He declared himself not bound by Justice Chase's circuit opinion which took the opposite view.³⁸

Washington's reliance on the authorities depended very much on the quality of reports of cases cited to him and he highlighted the problem of shoddy law reporting in *Crawford et al. v. The William Penn* (1819), complaining of precedents cited to him without a full and accurate report of the case which meant that he could not understand counsels' arguments or the justice's reasoning.³⁹

Despite his experience as a busy advocate, Washington's opinions do not exude the confidence of those of Justices Story, Livingston and Thompson. In *Odlin v. Insurance Co. of Pennsylvania* (1808) Washington set out his approach to decision making which was to seek out Supreme Court opinions, state court decisions, and English cases upon which to base findings. If he had no guiding precedent he was comforted by the fact that, if he was wrong, the Supreme Court would correct his error.⁴⁰ He again publicly expressed his unease in *McFadden v. The Exchange* (1811), deciding that the circuit court had jurisdiction over a vessel which had been captured by a French warship and was then in port in Philadelphia under French colours. His reversal of the district judge troubled him and he wondered if his decision would bear the close scrutiny of the Supreme Court. He

³⁷ *United States v. Moses*, 27 F. Cas. 5. Penn. October 1827.

³⁸ *Beach v. Woodhull*, Trenton, New Jersey, April 1803 in Peters, *Reports of the Third Circuit, 1803-1818*, vol. 1, 2.

³⁹ *Crawford et al. v. The William Penn*. 6 F. Cas. 781. New Jersey. October 1819.

⁴⁰ *Odlin v. Insurance Company of Pennsylvania*, 18 F. Cas. 583. Penn. October, 1808.

wrote, ‘I feel cheered that the error of my judgment, if I have committed one, can and will be corrected by a superior tribunal; for surely a question of such national importance as this is, ought not, and I hope will not rest upon a decision of this court.’ His call for an appeal was accepted by the parties and he was reversed in the Supreme Court.⁴¹ Again in *Consequa v. Williams* (1816) he suggested a possible correction by the Supreme Court if he was mistaken but the parties compromised the suit after Washington had handed down his opinion.⁴²

These expressions of uncertainty explain Washington’s constant search for support in precedent and his unease in having to decide a novel point without the comfort of a binding or persuasive authority. In *Hurst v. Hurst* (1807) he was called upon to interpret a Pennsylvania statute and, bemoaning the absence of precedent to guide him, he wrote ‘This being a case of first impression, and arising out of a state law, I have only to regret that it has fallen to the lot of this court to give a construction to it, before it has been considered and decided upon by the supreme court of this state,’⁴³ He wanted an interpretation by the Pennsylvania Supreme Court upon which to formulate his own view of the law. It is not speculative to suggest that Joseph Story would have been delighted to be the first to proffer an opinion on a new statute, and that demonstrates the difference in approach between the two justices.

Washington did not always confine the authorities he followed to those in which the facts were materially the same. In the same term in *Bond v. The Cora* (1807), he remarked, ‘But although no certain rule can be established to govern every possible case, yet it is proper to refer to former decisions in cases not very

⁴¹ *McFaden v. The Exchange*, 16 F. Cas. 85. Penn. October, 1811.

⁴² *Consequa v. Willings*, 30 F. Cas. 55. Penn. October 1816.

⁴³ *Hurst v. Hurst*, 12 F. Cas. 1031. Penn. April 1807.

dissimilar from that under consideration.’ He then followed a Supreme Court decision remarking that it ‘does, in all the circumstances, nearly represent the present as any I have met with’⁴⁴ His use of the phrases, ‘not very dissimilar’ and ‘nearly represent’ suggest a willingness to use a past decision which he believed, although not materially the same, was close enough to underpin his opinion. The following year in *Mott v. Morris*, Washington and District Judge Peters doubted whether their construction of the law on the question of priority of payment out of a bankrupt’s estate was correct, Washington wrote,

But, as it has been adopted by the supreme court of this state, our respects for the talents of that court, and our wish that as little collision as possible should take place between the decision of the federal and state tribunals upon the same question, will induce us to adopt the same construction.⁴⁵

Both judges were unconfident but because the state supreme court had reached a decision on the point, they followed it for the sake of harmonious federal and state jurisdictional relationships. Nowhere in his decision does Washington say that the state opinion was correct.

In *Hylton v. Brown* (1806) he followed a decision reached by Lord Hardwicke in *Metcalf v. Hervey*, 1 Ves. Sr. 248, despite the fact that he did not agree with it, simply because he regarded the English decision as ‘an authority binding upon us, and is too strong to be got over.’⁴⁶ At an earlier hearing in *Hylton* when deciding whether two witnesses were required to validate a will made in Pennsylvania, Washington found no precedent to guide him so District Judge Peters consulted directly and informally with two former state superior court judges to ascertain the usual practice. In *Delancy v. M’Kenn* (1806) Washington again looked

⁴⁴ *Bond v. The Cora*, 3 F. Cas. 838. Penn 1807. The Supreme Court precedent was *The Blairau*, 6 U.S. 240.

⁴⁵ *Mott v. Maris*, 17 F. Cas. 905. Penn. April, 1808.

⁴⁶ *Hylton v. Brown*, 12 F. Cas. 1129. Penn. April, 1806.

for assistance outside the usual channels when, unable to find any ‘adjudged’ case, he took to asking the opinions of ‘three gentlemen of the bar,’ not connected with the case, whether a copy of a title deed could be proved in evidence.⁴⁷ Asking former judges and members of the bar who had no involvement in the cases is a very useful way of assisting the decision making process. However, it was an unsatisfactory practice because those outsiders were not called as expert witnesses and subjected to questioning on their views. These cases support the view that Washington generally felt the need to find some support his opinions, even from unorthodox sources, so as not to have the responsibility of interpreting a new statute or decide a novel point of law. He felt more confident following principles of law well established by others.

This view of Washington, as a justice on occasion expressing a lack of confidence, is at odds with that of Stonier (1998) who, whilst acknowledging that his Supreme Court opinions were ‘modest, even diffident in tone,’ argues that his circuit opinions, ‘which usually take the form of his charges to the jury...bespeak the confident authority of one who sees himself as the embodied voice of federal law.’⁴⁸ While the cases which follow support Stonier’s view of Washington’s rapport with juries, the opinions do not confirm the view of a justice of ‘confident authority’ when difficult points of law arose.

A good example supporting Stonier’s assessment of Washington’s diffidence on the Court is to be found in his majority opinion in *Ogden v. Saunders* (1827) when he differed from Marshall on whether a state bankruptcy law passed before the execution of a contract was incorporated into the contract. Washington wrote,

⁴⁷ *Delancy v. M’Keen*, 7 F. Cas. 371. Penn. April, 1806.

⁴⁸ Stonier, 341.

I should be disingenuous, were I to declare, from this place, that I embrace it [my conclusion] without hesitation, and without a doubt of its correctness...it must remain for others to decide whether the guide I have chosen is a safe one or not.⁴⁹

As the sole arbiters of fact, juries were just as important to the court process as the judge and a good relationship between the two was essential to the administration of justice. Washington's many comments in the reports show that he believed trial by jury to be fundamental to a free society. Its members were drawn from all walks of life; that some had experience of commercial life is apparent from Washington's charge in the bill of exchange case of *Bell et al. v. Davidson* (1818) when he remarked, 'This is a question of account, and the jury will not expect assistance from the court; they will examine the accounts, and form an opinion on them.'⁵⁰

Despite fully accepting that the resolution of factual disputes lay entirely with the jury, where the law was clear and the evidence compelling, Washington occasionally charged the jury on the verdict they should return. An example is *Calhoun v. Vechio* (1812) in which he said, 'This is a very plain case...the plaintiff is therefore entitled to a verdict for the principal and interest of his account.' The jurors, as they invariably did, complied with the charge.⁵¹ He was also not averse to expressing strong views in a criminal trial. In *United States v. Morrow* (1827) the jury found the defendant not guilty after Washington observed that the counterfeit coins were such a miserable imitation of the genuine half dollar as to fool no-one.⁵² In *Consequa v. Willings* (1816) he explained that, contrary to the generally accepted practice, he always expressed a view on the facts if they were clear but never when

⁴⁹ *Ogden v. Saunders*, 25 U.S. 213 (1827).

⁵⁰ *Bell et al. v. Davidson*, 3 F. Cas. 100. Penn. April, 1818.

⁵¹ *Calhoun v. Vechio*, 4 F. Cas. 1049. Penn. April, 1812.

⁵² *United States v. Morrow*, 26 F. Cas. 1352. Penn. October, 1827.

they were in doubt.⁵³ The problem with that approach is that by reserving to himself the decision as to whether the facts were plain or doubtful, he usurped the function of the jury. That he should take such a forceful line is at odds with his mainly cautious attitude to his circuit duties. It would appear that he was more forceful dealing with factual issues than novel points of law because Section 22 of the Judiciary Act 1789 and the Seventh Amendment to the Constitution prohibited, save for exceptional circumstances, a review of a finding of fact but directions on law were always open to higher scrutiny.

There are only two reported cases where Washington refused to accept the verdict of a jury. In *King v. Delaware Insurance Co.* (1808) he ordered a new trial because he considered the jury's verdict a finding of law which they were not competent to make.⁵⁴ He took the same course in *Willis v. Bucher et al.* (1818), observing that the law must be for the judge as if he wrongly interpreted the law, it would be open to the Supreme Court to look at his reasoning and correct him. In that case he expressed great satisfaction at having to refuse verdicts of the jury on just two occasions in sixteen years.⁵⁵

Once a jury had returned a verdict, Washington refused to re-open the case for some perceived irregularity. In *Harrison v. Rowan* (1820) he would not inquire into the jury's deliberations despite affidavits from jurors complaining of undue pressure from other members of the jury. He would not tolerate the undermining of a verdict solemnly delivered in open court by delving into the secrets of the jury room.⁵⁶ One can understand this approach as there must be some finality to litigation and that

⁵³ *Consequa v. Willins*, 6 F. Cas. 336. Penn. April, 1816.

⁵⁴ *King v. Delaware Insurance Co.*, 14 F. Cas. 516. Penn. October, 1808.

⁵⁵ *Willis v. Bucher et al.* 30 F. Cas. 63. Penn. April, 1818.

⁵⁶ *Harrison v. Rowan*, 11 F. Cas. 663. New Jersey. April, 1820.

jurors occasionally have second thoughts ought not to be sufficient reason for re-opening the issues. The case of *United States v. Haskell et al.* (1823) brings to life the hardships sometimes faced by juries. In this mutiny at sea trial the jury had been kept together deliberating for three days and without food for twenty-four hours because they were not allowed to separate until they reached a verdict. Washington gave instances of the proper and necessary discharge of juries such as exhaustion, tampering with a juror, drunkenness or a juror becoming insane, which were problems he never faced.⁵⁷

Property Rights and Commercial Law on Circuit

The 520 reported circuit opinions of Washington demonstrate how he preserved existing titles to land and ownership of personal property. They also reveal his part in securing the economic prosperity of the nation by settling substantive federal law and procedural guidance which, in turn, promoted commercial activity. He used, on circuit and on the Court, the constitutional prohibition against ‘the impairment of contracts’ to preserve existing and future contractual obligations. His reported opinions cover the following branches of law: Maritime, marine insurance, and prize law (121); Land disputes and interpretation of wills (94); Mercantile law (78); Criminal law (33); Patent infringements (23); Bankruptcy (19); Revenue Duty (11); *Habeas corpus* (6); Slavery (6); Constitutional law (3). There were thirteen opinions covering diplomatic immunity, husband and wife, and the duties of trustees but too few of each to discern any patterns. The remaining opinions deal with procedural issues such as the admissibility of evidence, continuances, dismissal for want of

⁵⁷ *United States v. Haskell et al.*, 26 F. Cas. 207. Penn. October, 1823.

prosecution, competency of witnesses, jurisdiction, costs, and order of speeches which show the need for a thorough grounding in procedural as well as substantive law if cases were to be concluded efficiently and expeditiously.

Many of Washington's land dispute cases arose because of the manner in which lands were described in warrants. Often there were no man-made boundaries and it was difficult to identify natural borders such as mountains, rivers and streams in regions little explored, resulting in different claimants to the same land. His task was to bring order and certainty into real property ownership. In his first circuit court in Philadelphia he set out his approach to resolving such disputes by declaring that title to lands under the Pennsylvania Act of April 3, 1792 required occupancy and a bona fide intention immediately to reside on the land either personally or by a tenant. Carrying out improvements to the land was not conclusive and was merely evidence of an intention to settle.⁵⁸ He stressed the importance of a warrant holder using due diligence in having the land surveyed or he would lose priority over another warrant holder who, without knowledge of the earlier warrant, obtained the first survey.⁵⁹ His guidance to occupants of land was designed to ensure that titles were not defeated by a failure to observe the technicalities of land law.

Milligan v. Dickson (1817) is an example of Washington's determination to uphold existing rights of ownership of land. He had to decide whether he ought to approve the practice of admitting in evidence a power of attorney which went to proof of title. He declared, 'This usage forms one of the great and essential landmarks of real property in this state; and if titles depending upon it are to be uprooted this day, I will not be the judge to commence this work of devastation.'⁶⁰

⁵⁸ *Balfour's Lessee v. Meade*, 2 F. Cas. 543. Penn. April, 1803.

⁵⁹ *Gordon v. Kerr et al.*, 10 F. Cas. 801. Penn. October, 1806.

⁶⁰ *Milligan v. Dickson et al.* 17 F. Cas. 376. Penn. April 1817.

In *Huidekoper v. Burrus* (1804), he preserved the ownership of land by the then occupiers against an argument that settlement of United States land was essential if title was to pass. He ignored, when considering persistence in settlement, the failure to enter upon the land between 1792 and 1798, because of the real danger to life during the Indian wars.⁶¹

Washington extended his protection of property rights even to those who had assisted Britain during the Revolutionary War when, in *Gordon v. Holiday* (1805), he held that the Paris Peace Treaty of 1783 avoided all state proceedings, subsequent to the treaty, for the confiscation of enemy property. Therefore, an heir was entitled to succeed to the land owned by an alien.⁶² On occasion land titles were challenged on the basis that the requisite formalities of transfer or registration had not been complied with. Washington refused to interfere with title in *Griffith v. Tunckhouser* (1817) holding that a warrant and survey returned into the land office and accepted in Pennsylvania, transferred the legal title, and the regularity of the survey made by a sworn officer would be presumed unless the contrary was proved.⁶³ Failure to produce the original patent was not necessarily fatal to proving title. In *Willis v. Bucher et al* (1818), he preserved the status quo by charging the jury that an entry in the books of the land office in Pennsylvania that the balance of the purchase price had been paid by the person 'to whom the patent had issued' was evidence that the patent had actually been issued. Surveyors were required to enter and trace the land after a warrant had been granted. However, Washington, in *Torrey v. Beardsley* (1818) rejected a challenge to a title where the surveyor had traced the lines of the tract of land before a warrant for the land had been granted and had applied that

⁶¹ *Huidekoper v. Burrus*, 12 F. Cas. 840. Penn. April, 1804.

⁶² *Gordon v. Holiday*, 10 F. Cas. 798. Penn. April, 1805.

⁶³ *Griffith v. Tunckhouser*, 11 F. Cas. 42. Penn. April. 1817.

original survey to a later general warrant on un-appropriated land without returning to the land to make a fresh survey.⁶⁴ These cases support the conclusion that the Federalist policy of the preservation of existing titles to land was high on Washington's list of priorities. His circuit opinions reveal a determination to preserve existing land titles and, by setting out clear procedural rules, to ensure that ownership of land did not fail on a technicality.

That Washington had more than a passing acquaintance with Pennsylvania land law and would be well qualified to field disputed land questions on the Court is evident from his reported circuit opinions. Despite the fact that his cases had been solely concerned with Pennsylvania and New Jersey titles, principles of land law common to other states coupled with the assistance of colleagues from other circuits would see him through if asked to write for the Court on this topic.

Whilst this thesis, in part, looks to the use to which circuit expertise was put on the Supreme Court, Washington's circuit opinion in *Bleeker v. Bond* (1819) highlights how knowledge gained sitting in the Supreme Court might be put to use in the circuit court. In this circuit case Washington was able to bring to bear the knowledge he had acquired as a justice who had joined in the majority opinion in the landmark Supreme Court case of *Fletcher v. Peck* (1810). The Supreme Court had ruled unconstitutional a Georgia statute which had sought to avoid fraudulent sales in 1795 by corrupt Georgia legislators to land speculators of 35 million acres of Georgia land (now the States of Alabama and Mississippi) at rock-bottom prices. Some fifteen years later the land had been subdivided and ended up in many different hands, some of which were purchasers for value with no notice. It would

⁶⁴ *Torrey v. Beardsley*, 24 F. Cas. 65. Penn. April, 1818.

have been a nightmare situation attempting to unravel so many titles. The Supreme Court held the Georgia statute unconstitutional because it infringed Article 1, Section 10, Clause 1 of the Constitution, prohibiting any state from passing a law ‘impairing the obligation of contracts,’ despite the fact that the original sales had patently arisen as a result of bribery.⁶⁵ This was the first time the Court struck down, as unconstitutional, a state statute. By upholding this dubious agreement, the Court was sending a clear message to the business community that it would uphold their less questionable contracts wherever possible. Washington applied the *Fletcher ratio* to his circuit case and did so with the confidence of a justice who had heard the issues fully argued at the highest level.

Whilst Washington protected existing proprietary rights, he did acknowledge the right of the federal and state governments to acquire private property for the general good. In *Bleeker*, he gave a glimpse of his political philosophy, and an exception to the sanctity of contracts, observing, ‘It is true, that private interests must be subservient to the public necessities. This results from the nature of the social contract. Under every government...private property may be taken for the public good, provided fair compensation be paid for it.’ However, he further demonstrated his commitment to the sanctity of contracts when, in *Golden v. Prince* (1814), he held unconstitutional a Pennsylvania law which authorized the discharge of a contract by payment of a smaller sum at a different time and in a different manner than originally agreed on the ground that it impaired the obligation of contracts.⁶⁶

⁶⁵ *Bleeker v. Bond*, 3 F. Cas. 687. Penn. October, 1819; *Fletcher v. Peck*, 10 U.S. 87 (1810).

⁶⁶ *Golden v. Prince*, 10 F. Cas. 542. Penn/ April, 1814.

Washington promoted commerce by setting out firm rules governing bills of exchange, promissory notes and accommodation bills so that men of business would know precisely their rights and obligations in relation to these negotiable instruments, the lifeblood of national and international trade.⁶⁷ He protected the rights of an enemy alien on a bill of exchange holding that, if the debtor knew that the alien had an agent in the United States, interest on the bill did not abate during the war.⁶⁸ Meticulous in ensuring that the parties to a bill of exchange abided by the original terms he held, in *Craig v. Brown* (1819), that where a defendant promised to pay the amount due under the bill ‘when able’ and the plaintiff did not wait and sued immediately, Washington held that the creditor could not afterward resort to the promise to pay when able.

He extended his promotion of commerce by clarifying the law and procedure governing maritime contracts and ocean marine insurance. There were so many such cases in the hub port of Philadelphia that definitive statements of law and practice were necessary to assist those engaged in this expanding mode of international trade. In *McGregor v. Insurance Company of Pennsylvania* (1803), he regulated the relationship between insurer and insured by holding insurers bound by the terms of the contract and unable seek to reduce compensation on a total loss of freight by relying on an alleged local custom which was not well known in the trade and which was unreasonable.⁶⁹ He insisted, in *Delaware Insurance Company v. Hogan* (1807)

⁶⁷ *Humphreys v. Blight's Assignees*, 12 F. Cas. 875. Penn. April, 1803; *Perry et al. v. Crammond et al.*, 19 F. Cas. 277. Penn. April, 1804; *Corser v. Craig*, 6 F. Cas. 601. Penn. April, 1806; *Gallagher v. Roberts*, 9 F. Cas. 1089. Penn. April, 1808; *McMurtry v. Jones*, 16 F. Cas. 312. Penn. April, 1813.

⁶⁸ *Denniston et al. v. Imbrie*, 7 F. Cas. 485. Penn. April, 1818.

⁶⁹ *McGregor v. Insurance Company of Pennsylvania*, 16 F. Cas. 129. Penn. April, 1803.

that the terms of a marine insurance policy could not be departed from unless fraud or mistake was clearly made out.⁷⁰

The marine insurance issues presenting themselves to Washington were many and varied. Avoidance of a policy due to a deviation from an agreed route was a common source of dispute. In times of war, vessels were liable to capture by the enemy and it was, therefore, important to know the route and port of destination to assess the risk and fix a premium. Washington held, in *Martin v. Delaware Ins. Co.*, (1808), that the smallest unjustified deviation from an agreed course avoided the policy.⁷¹ Thus, in *Cruder v. Pennsylvania Ins. Co.* (1809) he avoided a policy where the ship went off course to pick up additional hands, holding that a ship should have sufficient hands to man her at the departure port.⁷² He did, however, admit of exceptions to his strict view of these cases and in *Coles et al. v. Marine Insurance Co.* (1812) he found acceptable a deviation to effect essential repairs of storm damage or landing to obtain fresh provisions.⁷³ However, in another aspect of *Cruder*, a deviation to effect repairs which were required at the commencement of the voyage avoided cover.⁷⁴ That Washington was sensible of the difficulties facing masters of vessels in wartime was demonstrated in *Goyon v. Pleasants* (1814) by his ruling that a deviation to evade enemy British cruisers did not vitiate the policy.⁷⁵

The effect of misrepresentation and the concealment of information which would affect the risk in marine insurance contracts was a topic familiar to Washington's circuit court and one which required opinions to guide the conduct of

⁷⁰ *Delaware Insurance Company v. Hogan*, 2 Peters 4. Penn. April, 1807.

⁷¹ *Martin v. Delaware Ins. Co.*, 16 F. Cas. 894. Penn. October, 1808.

⁷² *Cruder v. Pennsylvania Ins. Co.*, 6 F. Cas. 921. Penn. October, 1809.

⁷³ *Coles et al. v. Marine Insurance Co.*, 6 F. Cas. 65. Penn. April, 1812.

⁷⁴ See *Cruder*, n. 74

⁷⁵ *Goyon v. Pleasants*, 10 F. Cas. 891. Penn. April 1814.

the parties. In *Kohne v. Insurance Company of North America* (1804) the insured failed to disclose to the insurer that his vessel was carrying goods from Cuba to Spain despite a prohibition by the British government of a neutral vessel trading between a colony and a belligerent mother country. Washington directed the jury that the risk of capture and forfeiture had been increased and the failure to give full disclosure avoided the policy.⁷⁶ He came down heavily on fraudulent or negligent disclosure of the fate of vessels before effecting insuring. He obviously avoided the policy in cases where the insured knew the ship had already been lost and extended the bar to recovery in *Vale v. Phoenix Insurance Co.* (1805) where the plaintiff had reliable information which would have led him to believe the ship which had his goods on board may well have been lost at sea.⁷⁷ He sent a clear message to insured trading with a belligerent country or carrying goods which infringed the United States neutrality laws that, unless they made disclosure of those material facts, the insurers would be entitled to vitiate the policies in addition to any forfeiture for breach of embargo.⁷⁸

Washington acknowledged the need to deviate from the agreed route to repair and re-provision vessels after damage and delays caused by abnormal weather conditions so that the ship might resume her voyage or return home. In *Ross v. The Active* (1808) he held that a master was entitled to sell part of the cargo to effect essential repairs to the vessel where the owner of the ship also owned the cargo.⁷⁹ However, when a master borrowed money on the security of the ship and cargo

⁷⁶ *Kohne v. Insurance Company of North America*, 14 F. Cas. 835. Penn. April, 1804.

⁷⁷ *Vale v. Phoenix Insurance Co.*, 28 F. Cas. 687. Penn. April, 1805. See *Johnson v. Phoenix Insurance Co.* 13 F. Cas. 782. Penn. April, 1806 where the plaintiff was non-suited as the evidence showed clearly that he had known the vessel to be lost.

⁷⁸ *Marshall v. Union Ins. Co.*, 16 F. Cas. 849. Penn, October, 1809. (Breach of neutrality laws); *Baudy et al. v. Union Insurance Co.*, 2 F. Cas. 1039. Penn. October, 1809), (Trading with belligerent country).

⁷⁹ *Ross v. The Active*, 20 F. Cas. 1231. Penn. October 1808.

which enabled the lender to claim the property if the loan and interest was not paid upon the ship's safe return to its home port, the lender had to satisfy the court that the loan was necessary for the continuance of the voyage.⁸⁰

He was not the only justice who realized that international trade could not flourish unless there were sufficient seamen to man the nation's mercantile marine. He tried cases of misconduct at sea, arising from excessive punishment by the master or conduct ranging from mere insubordination to open revolt by the crew. In *United States v. Smith et al.* (1809), he went outside the facts of the case to explain carefully to the jury the limits of the master's authority to correct his seamen and their duty of submission to lawful orders. In that case he directed the jury that where a master used an unlawful weapon or put the seamen in danger of his life, the seaman was entitled to use reasonable force to protect himself.⁸¹ On occasion unscrupulous masters and owners attempted to avoid paying seamen wages earned. Washington was keen to protect the position of the crew by insisting that no charge of desertion or absence without leave justifying loss of all or part of the remuneration would be accepted unless there was a contemporaneous entry in the ship's log recording the allegation.⁸² Where in *Sims v. Jackson*, (1806) a seaman hired for a return voyage from Philadelphia to Batavia died in Batavia, Washington affirmed the district judge's decision to award his widow the full wages instead of the half offered by the owners. Experience and common sense prevailed in *Ketland v. Lebering* (1808) to ensure that the administrators of a deceased received his wages. The owners claimed that no-one named John Lebering had served on board

⁸⁰ *Walden v. Chamberlain*, 28 F. Cas. 1353. Penn. April 1814.

⁸¹ *United States v. Smith et al.*, 27 F. Cas. 1247. Penn. October 1819.

⁸² *The Phoebe v. Dignum*, 19 F. Cas. 530. Penn. April, 1803; *The Betsey v. Duncan*, 3 F. Cas. 308. Penn. October, 1808.

their vessel. Washington called for the ship's muster roll which showed a John Lebrun on board. He remarked, 'We know by everyday experience that a false pronunciation of surnames is frequently given, particularly with the abridgment of them.'⁸³ Washington again came down on the side of the crew in *Girard v. Ware et al.* (1815). A United States vessel was captured by the British blockading Delaware Bay and the crew was forced ashore. After a ransom was paid the ship was permitted to proceed to Philadelphia with a new crew, the old crew not being given the option to continue the voyage. Washington held that the crew were entitled to wages for the entire trip but, in a judgment of Solomon, he held that they had to contribute towards the ransom.⁸⁴ By laying down clear rules as to the conduct of the parties in maritime contracts and by protecting those who manned the vessels, Washington was again actively promoting commercial enterprises.

The above cases reveal how the circuit opinions of this conservative Federalist were designed to preserve existing property rights, the obligation of contracts, and stimulate national and international trade by setting out guidelines for business relationships on land and at sea. This study now turns to the generality of the justice's circuit work, to include not only landmark circuit opinions but also those of limited jurisprudential value to ascertain the overall expertise Washington gained from the day to day resolution of the many varied legal problems he faced in Philadelphia and Trenton.

⁸³ *Ketland v. Lebering*, 14 F. Cas. 433. Penn. April, 1808.

⁸⁴ *Girard v. Ware et al.*, 10 F. Cas. 441. Penn. April, 1815.

States' Rights, the War of 1812, and Slavery

Washington dealt with two important constitutional cases on circuit; one involving a state's attempt to deny by force the authority of a federal court and the other a state's determination to protect its natural resources against outsiders. He also delivered many opinions resolving competing claims to captured merchant vessels and warships before and during the 1812 War between the United States and Britain and settled the fate of vessels attempting to breach United States embargo and neutrality laws. Although he dealt with a small number of slavery cases, the opinions do permit an insight into his approach to this troubled issue. The opinions reflect the deep tensions facing the nation in its formative years.

The constitutional cases were *United States v. Bright* (1809) and *Corfield v. Coryell* (1823).⁸⁵ *Bright* was a case in which Washington resisted severe local pressure when holding that no state had the power to defy an order of a federal court. The dispute concerned competing claims for prize money in respect of the captured British sloop, *The Active*. Gideon Olmstead and other Connecticut sailors had been captured by the British during the Revolutionary War and were forced to serve on the sloop. Olmstead and his mates managed to gain control of the sloop and while *en route* for New Jersey it was captured by a Pennsylvanian warship. Both captors claimed the sloop as a prize of war and a jury of the Pennsylvania state admiralty court, without stating any facts, gave Olmstead a mere quarter share. Olmstead then took his case to the court of appeal in prize cases, set up by Congress under the Articles of Confederation and he was awarded the whole of the prize. The state court refused to acknowledge the award and in 1779 the three quarter share was paid to

⁸⁵ *United States v. Bright*, 24 F. Cas. 1232; *Corfield v. Coryell*, 6 F. Cas. 546 (1823).

the state treasurer. As late as 1802, Olmstead took action in the federal district court to enforce payment of the full share he had been awarded twenty-three years earlier. District Judge Peters found in his favour whereupon the Pennsylvania legislature, in open defiance of the federal court order, passed an act ordering the treasurer's representatives to pay the three-quarter share into the state treasury. The Supreme Court issued *mandamus* compelling Judge Peters to enforce his order. General Michael Bright and his militia, on the express orders of the governor, assembled outside the home of the treasurer's representatives with muskets and fixed bayonets and resisted the efforts of the federal marshal to enforce the district judge's order. The general and his men were subsequently indicted by a federal grand jury for resisting United States law and tried by Washington, Peters, and a jury. With local sentiment running high in favour of the defendants, Washington took charge of a potentially explosive situation. The defendants argued that the federal court had no jurisdiction to reverse a jury verdict of a state court and that they had been acting under the direct orders of the state governor. Washington charged the jury that the Supreme Court in *Penhallow v. Doane* (1795) had established that an appellate prize court had the power to reverse a state admiralty court on findings of fact and law and that was settled and at rest.⁸⁶ He was emphatic in his charge to the jury that no state had the power to declare the judgments of the national courts null and void because the Constitution had declared United States law to be the supreme law of the land. If that were not so, government would be undermined and liberty curtailed and the threat of physical violence with potentially terrible consequences was a monstrous reaction which could never be justified.

⁸⁶ *Penhallow v. Doane*, 3 Dall. (3 U.S.) 54 (1795).

The jury returned a special verdict which placed the responsibility of the verdict on Washington's shoulders. They found that the defendants had resisted the federal marshal but had done so on the orders of the governor, leaving the court to decide whether acting on superior orders was a defence to the indictment.

Washington had no hesitation in holding that the threatened use of force to resist a lawful federal court order was no legal justification as the general and his men had a paramount duty to the Union and not to the state governor. Taking the view that obedience to the governor was a mitigating factor, he imposed modest sentences which were never served, the situation having been defused by President James Madison's immediate grant of pardons. The case illustrates the tensions between state and federal authorities and how, on occasion, the circuit court tried disputes with potentially nationwide repercussions. It also demonstrates how important it was to have a justice presiding who had the courage and determination to uphold the Constitution, the Union, and the authority of the federal courts against intense state pressure.

Bright was not the only case in which Washington vehemently condemned those resisting federal authority. In *United States v. Lowry et al.* (1808) three armed defendants threatened to kill a deputy federal marshal who had served on them court orders for possession of land. Sentencing each man to three months imprisonment, Washington said, 'the courts of justice are the sanctuaries of the law; and it is through the law that that the government speaks and acts. Impair by any means...the power of these tribunals...and you attack the majesty of the law...and the foundations of the republic.'⁸⁷

⁸⁷ *United States v. Lowry et al.*, 26 F. Cas. 1008. Penn. April, 1808.

His other major constitutional opinion arose much later in his tenure and is probably the most important case he tried on circuit. *Corfield v. Coryell* (1823) turned on the constitutionality of an 1820 Act of Assembly of the State of New Jersey prohibiting non-residents of the state from gathering oysters in New Jersey waters from May to December. He gave his opinion after much thought as the legal issues were argued in the October 1823 term and the opinion was not handed down for six months. The case was important for two reasons. First, Washington had to decide whether the prohibition contravened Article VI, Section 2 of the Constitution which conferred on the citizens of each state ‘all the privileges and immunities of citizens in the several states.’ Second, and because the vessel seized and condemned had been hired out with its coastal licence to a citizen of Pennsylvania, it was argued that a state prohibition usurped the power bestowed upon Congress by virtue of Article 1, Section 8 of the Constitution ‘to regulate commerce...among the several states.’ These constitutional challenges gave Washington the opportunity to expound his view of the purpose, meaning, and effect of the freedoms guaranteed by the Constitution.

The most important privileges and immunities enumerated by Washington were:

Protection by the government; the enjoyment of life and liberty, with the right to acquire property of every kind, and to pursue and obtain happiness and safety; subject to such restraints as the government may justly prescribe for the general good of the whole; the right of a citizen to pass through or reside in any other state for the purpose of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by other citizen of the state.⁸⁸

The list is not exhaustive but includes the crucial freedoms, echoing the rights to, ‘Life, Liberty, and the Pursuit of Happiness’ enshrined in the Declaration of

⁸⁸ *Corfield v. Coryell*, 6 F. Cas. 551-552. Penn, April, 1823.

Independence. This early attempt at defining the ‘privileges and immunities’ clause, unusually for a circuit court opinion, was extensively cited by the Supreme Court in the 1873 *Slaughterhouse Cases* when considering the meaning of the ‘privileges and immunities’ clause of the 1808 Fourteenth Amendment.⁸⁹

In *Corfield* Washington stressed the importance of engendering mutual friendship and intercourse among the citizens of the different states of the Union but, in the event, held that the state law was not unconstitutional because the oyster beds were the common property of the citizens of New Jersey whose legislature had the power to regulate the use of such a natural resource. Washington disposed of the privileges and immunities argument by similar reasoning, holding that any fishery or oyster bed was as much the property of the individual who owned it as was any dry land he owned. Therefore, it was lawful for the state legislature to pass laws protecting such ownership against others whether they were fellow citizens or outsiders. A state legislature can never be compelled to extend to citizens of other states the rights which belong exclusively to its own citizens. To have held otherwise would have undermined the right of a state to control assets owned in common by its citizens. This case was one of the few occasions when Washington in a circuit opinion threw his normal caution to the wind and expressed himself forcefully on an issue of supreme national importance.

Bright and *Corfield* demonstrate how important the federal circuit courts were not only to the development of American law but also to the resolution of potentially dangerous tensions between the federal government and a state, and significant competing claims between states. A state prepared to use violence to defy an order

⁸⁹ *Slaughterhouse Cases*, 86 U.S. 36 (1873).

of the United States Supreme Court and attempts by outsiders to use the natural resources of a sovereign state were issues which required determination by a judge who had Supreme Court status and not by a local district judge upon whom the pressures would have been far greater. These two cases and the 1812 War cases which follow show the wisdom of Congress in sending justices out on circuit anticipating that not all of their functions would be straightforward.

The bulk of Washington's circuit work comprised maritime law, prize cases and marine insurance of which there are one hundred and twenty one reported opinions. Prize cases alone account for twenty-four of the maritime cases.⁹⁰ During the war between the United States and Britain from 1812 to 1815, 1634 British vessels were taken as prizes by Americans, 1500 of which were sent with prize crews to American ports but it is estimated that half were recaptured en route by British privateers.⁹¹ Much of Washington's maritime work arose as a result of the Embargo Act of December 22, 1807 passed by Congress as a counter measure to repeated violations of United States neutrality by Britain and France who were seizing American vessels and impressing crews. The Act prohibited any ship leaving a United States port for a foreign port. In fact the embargo hit the United States harder than it did the European powers and American manufacturers and farmers suffered great hardship because of the total ban in imports and exports. Ships were idle and seamen out of work. Because of widespread opposition, on March 1, 1809, the Embargo Act was replaced by a Non-Intercourse Act which confined the ban to trade with Britain and France. Section 2 of the 1807 Act required all masters or

⁹⁰ The Marshall Court dealt with a total of 111 prize court cases indicating how widespread these cases were as not every case went to the Court. See James Brown Scott, *Prize Cases Decided in the United States Supreme Court, 1789-1918, Including Also Cases on the Instant Side in which Questions of Prize Law were Involved*, vol.1 (Oxford: Clarendon Press, 1923).

⁹¹ *Niles Weekly Register*, August 12, 1815, cited in Donald A. Petrie, *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail* (Annapolis: Naval Institute Press, 1999), 165.

owners of vessels to give a bond with sureties to a local collector for double the value of the ship and cargo guaranteeing that she was bound for another American port. Merchants and ship owners devised ways of evading the embargo despite heavy penalties and unsuccessful attempts resulted in an appearance before Justice Washington fighting to avoid the forfeiture of vessel and cargo.

Washington saw through desperately spurious excuses quite easily. In *United States v. The Paul Sherman* (1815), the master of a vessel took on board cargo at a port where trade was prohibited. He then sailed into a U.S. port ostensibly to land men saved from a wreck. Washington, in rejecting, the master's story observed, 'The illegality of the transaction is attempted to be concealed by a drapery too thin to impose on the most credulous mind.'⁹² He did, however, examine each case scrupulously. Thus, in *Parker v. United States* (1806) he reversed the district court's condemnation of a vessel for breach of embargo when he reasoned that forfeiture could not be claimed after the vessel had arrived within the jurisdiction of a foreign power and he refused forfeiture in *United States v. Dixey et al.* (1811) when he was satisfied that a vessel bound from Philadelphia to New Orleans struck the Bahama Bank and was obliged to put into Havana for essential repairs.⁹³ Further, in *United States v. Morgan et al.* (1811) he held an embargo bond void because it was more onerous than the Act.⁹⁴

Washington's opinions are invariably expressed in measured and moderate language. However, in one prize case, he expressed his anger when he perceived an injustice which he felt unable to remedy. In *Armroyd et al. v. Williams et al.* (1811)

⁹² *United States v. The Paul Sherman*, 27 F. Cas. 467. New Jersey, April, 1815.

⁹³ *Parker v. United States*, 18 F. Cas. 1179. Penn. October, 1809; *United States v. Dixey et al.*, 25 F. Cas. 871. Penn. April, 1811.

⁹⁴ *United States v. Morgan et al.*, 26 F. Cas. 1315. Penn. April, 1811.

a French admiralty court condemned as a prize an American vessel on the ground that she was in violation of the Milan Decree by which Napoleon prohibited all trade with Britain. Washington upheld the forfeiture but with the utmost reluctance, complaining that the regular order of things had been disturbed by the ‘violence and rapine of the belligerents’ [Britain and France]. He wrote, ‘we sicken with disgust in giving the appellees the benefit of a general principle of law which complies submission to so daring assault on our neutral rights.’ Despite his anger at the action of the French court, he felt constrained to reach his holding because it was a competent court of the law of nations and its decisions, however unpopular, were binding. His view was that it was for the courts to follow the law of nations and for the government to protect its citizens.⁹⁵ That opinion was affirmed by the Supreme Court. Chief Justice Marshall, writing for the Court, also believed the French decree to be subversive of the law of nations but not one which the Court could examine.⁹⁶ The attitude of Washington and the Court, through Marshall, is indicative of a new nation which, notwithstanding the unreasonable and unjust actions of powerful European countries, was not prepared to be known as a republic unwilling to subscribe to international law doctrines, however distasteful the circumstances.

Despite their maritime differences, France, Britain and the United States were as one in their desire to stamp out the slave trade. The Act of March 22, 1794 prohibited any citizen or resident of the United States from equipping vessels within the United States to carry on the trade or traffic in slaves to any foreign country. Despite the fact that there are only six reported slavery opinions delivered by Washington on circuit, three of those cases give an insight into Washington’s

⁹⁵ *Armroyd et al. v. Williams et al.*, 1 F. Cas. 1132. Penn. April, 1811.

⁹⁶ *Williams et al. v. Armroyd et al.* 7 Cranch (11 U.S.) 423.

approach to the issues. In *Tryphenia v. Harrison* (1806), he dealt with an allegation of breach of the 1794 Act. Two French women were aboard a brig with their two slaves for whom they had paid passage from St. Thomas to Havana. The district court found the brig to be in breach of the Act but Washington reversed the district judge, holding that the slaves were not carried for sale but as attendants.

Notwithstanding his condemnation of the slave trade as ‘this inhuman and unjustifiable traffic,’ he then distinguished between those free Africans then being transported into slavery and those already in bondage. He wrote, ‘why should congress prohibit the carrying of persons, already slaves in one of the West Indian Islands, to be sold in another? The situation of these unfortunate persons cannot be rendered worse by this change of situation and masters.’⁹⁷ This view of African slaves as personal property was to be echoed, as described earlier, when justifying the sale of his slaves in 1821.

There are two of Washington’s reported cases in which slaves achieved freedom. In *Butler v. Hopper* (1806) Washington held that a former Member of Congress from South Carolina who lived, attended by his slave, both in South Carolina and Pennsylvania, had breached the Pennsylvania Act of 1780 which prohibited the holding of a negro in the state unless registered under the Act. The Act provided exemptions for the domestic slave of a member of Congress or of a person passing through or sojourning in the state without becoming a resident. Washington charged the jury that the ‘owner’ could not claim either exemption because he had been out of Congress for two years and was a resident of Pennsylvania as he lived in each state for half of the year. The slave was declared a

⁹⁷ *Tryphenia v. Harrison*, 24 F. Cas. 252. Penn. October, 1806.

free man.⁹⁸ Similarly in *Ex parte Simmons* (1823) another slave who resided with his master in Philadelphia for a period in excess of six months, with no attempt to return him to the plantation in Charleston until his application to the court, was held by the jury, on Washington's charge to be free under the provisions of the same Act.⁹⁹ The two opinions in favour of freedom resulted from clear breaches of statutory provisions and are examples of the justices' very limited success in the area of domestic slavery.

Washington's expertise in specific areas of law was gained from his practice at the Bar and from his work on circuit.¹⁰⁰ What remains to be examined is the extent to which this expertise was put to use in the Supreme Court majority opinions he was assigned to write and any shifts in jurisprudential attitude from circuit court to Supreme Court. His Supreme Court opinions are sparse when compared with his circuit output. Unlike the 520 surviving reported circuit opinions which comprise only a fraction of Washington's opinions, every Supreme Court opinion he delivered was recorded in the *United States Reports*. The first twenty-seven volumes of those reports show that during his thirty one years on the Court Washington wrote, when compared with John Marshall and Joseph Story, a modest eighty opinions. Eight were handed down *seriatim*, two were dissents, two concurred with the majority, and the remainder he wrote as the opinion of a unanimous Court or on behalf of the majority. His opinions covered the following topics:- twenty-three maritime, prize and marine insurances cases; eleven land disputes; ten cases with a contract and mercantile background; nine constitutional law cases; six wills or intestacy disputes;

⁹⁸ *Butler v. Hopper*, 4 F. Cas. 904. Penn. October, 1806.

⁹⁹ *Ex Parte Simmons*, 27 F. Cas. 151. Penn. October, 1823.

¹⁰⁰ Washington's expertise in land law cases are contained in his two volume set of Virginia Court of Appeals reports.

five criminal cases; two infringement of patents; and one slavery case. The remaining opinions settled procedural issues such as the admissibility of evidence, whether an action was statute barred or how many counsel were permitted to argue on each side of the case.

Washington's two dissents were delivered with great reluctance. He believed dissenting opinions weakened the authority of the Court as shown by his urging Justice Story not to dissent in what he described as 'ordinary cases' because it 'was of no benefit to the public.'¹⁰¹ In *Mason v. Haile* (1827) he announced his custom of never dissenting when he disagreed with the majority unless considering important constitutional issues.¹⁰² This public admission was made at the end of his tenure. If he had gone public whilst President Jefferson was in office it would have provided him with much needed ammunition with which to attack Marshall's departure from the *seriatim* opinions of his predecessors. The problem with this approach is the difficulty in defining 'ordinary cases.' There are so many cases which do not raise 'important constitutional issues' case but which are of sufficient significance to merit a dissenting view. It is clear that his reluctance to dissent arose solely from his wish that the Court present a united front to the nation.

In *Mason*, he was unable to accept the majority view that the states had the right to regulate or abolish imprisonment for debt retrospectively as it altered the contractual position of debtor and creditor and, therefore, infringed the contracts clause of the Constitution. In dissenting, Washington demonstrated the rigid adherence to the sanctity of existing contracts he had adopted in his circuit opinions. His only other dissent occurred in *Lambert's Lessee v. Payne* (1805) when

¹⁰¹ Letter, Joseph Story to Henry Wheaton [court reporter], April 8, 1818 in W.W. Story, *Life and Letters*, vol.1, 304-305.

¹⁰² *Mason v. Haile*, 25 U.S. (12 Wheat.) 370 (1827).

abandoning his usual strict interpretation of words used in legal documents, he sought to look with indulgence at technical words used by a testator unused to legal phrases, but his was the lone voice.¹⁰³ It is easy to understand his dissent in *Mason* which was a case with constitutional implications. However his dissent in *Lambert's Lessee* is more difficult to comprehend as it was a case which affected only the immediate parties and was contrary to his custom expressed in *Mason*.

Washington concurred in the landmark case of *Dartmouth College v. Woodward* (1819). The New Hampshire legislature enacted laws upheld by the New Hampshire Superior Court placing appointments to the college board in the hands of the state governor, effectively nationalizing a private institution in the early days of a nation dedicated to free enterprise. The college had been established by a Crown Charter in 1769. Controversially, John Marshall held the charter to be a private contract between the college and the Crown. It followed, therefore, that the legislation was unconstitutional, contravening the prohibition on a state passing laws impairing the obligation of contracts. Marshall cited no authorities to support his view that the charter was a contract, boldly declaring that, 'It can require no argument to prove the circumstances of this case constitute a contract.' Washington, troubled that such an assertion had been made devoid of any supporting precedent, took the unusual step of filing a concurrence which cited United States and English decisions supporting Marshall's view. Justice Story took a wide entrepreneurial approach, seeking to bring all corporations and charters within the protection of the contracts clause, whereas Washington believed that it should cover only institutions such as the college.¹⁰⁴ This case illustrates Washington's commitment to promoting

¹⁰³ *Lambert's Lessee v. Payne*, 7 U.S. (3 Cranch) 97 (1805).

¹⁰⁴ *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 659 (1819).

commerce through the contracts clause but confirms the ‘moderation’ described by Story in his eulogy by severely limiting the category of institutions entitled to protection under Article One, section 10.

Washington again emphasized that commitment to contractual obligations in the constitutional case of *Green v. Biddle* (1823), delivering the majority opinion refusing an application for a rehearing. Virginia had by compact surrendered to the United States land which later became the state of Kentucky but restricted Kentucky’s right to interfere with any titles already granted by Virginia. Washington held, as Justice Story had on the original hearing, that Kentucky’s legislation restricting the titles granted by Virginia was an infringement of the obligation of contract.¹⁰⁵

Washington wrote for the Court on slavery on just one occasion when, in 1824, the Court rejected the argument that the Acts of 1794, 1810, and 1818 to suppress the slave trade were limited to a prohibition against bringing into bondage persons who were free in their own country. The district court of Alabama had confiscated a vessel and cargo, which included slaves, for contravening the Acts by transporting, on an American vessel, slaves from one slave holding country to another. Washington affirmed the district judge but, following his circuit court opinions and his view of slaves as mere ‘property,’ he wrote for the majority that those existing slaves on board who were passengers ‘to be delivered to their owners or to those to whom they had been consigned,’ should be returned to their owners.¹⁰⁶

Save for Washington’s opinion in *Ogden v. Saunders* (1827) his contribution to bankruptcy and insolvency law on the Court was small. In that case the Court

¹⁰⁵ *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823).

¹⁰⁶ *The Merino*, 22 U.S. 391 (1824).

pondered whether the federal government had exclusive powers in bankruptcies. Congress had been given authority, in the Constitution, to establish uniform bankruptcy laws throughout the Union but had not exercised the power. Washington, for the majority, held a New York bankruptcy law to be within the Constitution on the narrow ground that it had been enacted before the contract had been entered into and would have been in the parties' contemplation and, therefore, did not impair the contract. Washington expressed his respect for 'the wisdom, the integrity, and the patriotism of the legislative body' and declared that he would always presume that legislation complied with the Constitution unless the contrary was proved 'beyond all reasonable doubt.'¹⁰⁷ This was an admission further supporting an unwillingness to look at existing laws with a critical eye.

One of Washington's few patent cases, *Evans v. Jordan* (1815), sheds light on Marshall's opinion assignment practice. Marshall did not sit because it was an appeal from his circuit opinion and Washington was the senior associate whose view clearly coincided with the majority. During the course of his opinion he revealed that he had dealt with the same point on his circuit. His seniority coupled with knowledge of the specific point of law made him the ideal candidate for the task. It is difficult to imagine a failure to mention his familiarity with the issue before being asked to write the opinion.¹⁰⁸

Because civil disputes formed the major part of the Court's work, there were few criminal cases to be assigned by the Chief Justice. Washington authored only five. One is relevant because it highlights a way in which the circuit court shaped American law. In *United States v. Kelly* (1826), Washington merely stated that the

¹⁰⁷ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

¹⁰⁸ *Evans v. Jordan*, 3 U.S. (9 Cranch) 199 (1815).

Court was considering a division of opinion from the judges of the Pennsylvania circuit court. In his circuit opinion, however, he made it clear to counsel that he and the district judge had reluctantly given a definition of the crime of revolt because other judges had done so on circuit. He believed it was for Congress to define the offence, so he invented a division of opinion to have the law clarified by the Court. In the event he gave the opinion of the Court, and, emboldened by his brethren, he had no hesitation in declaring that the Court was competent to define the offence.¹⁰⁹

Conclusion

Washington was an extremely cautious justice, almost entirely dependent on the doctrine of precedent for guidance as to what his opinion should be; unhappy when he was faced with a novel point of law and overly concerned about the view the Supreme Court would take if his rulings were taken on appeal. That his defining jurisprudence was the need for certainty and uniformity of federal law is supported by his opinion in *United States v. Bright* of the ‘miserable’ condition facing any community disregarding precedent. He felt constrained by legal principles in *Croudson & Ors. v. Leonard* even though he accepted injustice would arise, taking the view that a judge should not usurp the function of government by remedying injustices in the law. He was firmly of the view that a judge was duty bound to follow the law and not consider the effect on the parties as he did in *Scriba v. Insurance Company of North America* and in *Kirkpatrick v. White et al.* His refusal to investigate alleged irregularities in jury deliberations and his obvious pride in declaring that he disagreed with his juries only twice in sixteen years are further

¹⁰⁹ *United States v. Kelly*, 26 F. Cas. 700, Penn. October, 1825; *United States v. Kelly*, 24 U.S. 417 (1826).

examples of an inflexible approach to the administration of justice. (*King v. Delaware*; *Willis v. Bucher*; *Harrison v. Rowan*; *United States v. Haskell et al.*).

In *Ogden v. Saunders*, Washington felt compelled to follow the earlier decision of *Sturges v. Crowninshield*, in which he had concurred, despite believing it to have been wrongly decided. This approach, for the sake of unanimity, was also evident in his advice Story not to dissent because it weakened the Court's authority and also by his remark in *Mason v. Haile* that he never disagreed with the majority unless it was a constitutional issue. It is further supported by only two dissents in thirty years; once in *Mason* and the other in *Lambert's Lessee v. Payne* which was not even a constitutional matter.

In his search for support Washington and the other justices looked for guidance to the small number of federal statutes and Supreme Court decisions; to state laws and, in particular, to the decisions of the English courts and the text-books of the English jurists. Washington was more reliant than his colleagues on the decisions of English judges and Lord Mansfield, in particular, whom he regarded as the highest authority. (*Ferguson v. Zepp*; *Bobyshall v. Oppenheimer* and *Barnes v. Billingham*). His reliance on English law and practice was such that, in *Craig*, where state law conflicted with English law, he preferred the latter. Washington readily adopted the opinions of other circuit courts even though of only persuasive authority. (*Treadwell et al. v. Bladen*; *Martin v. Bank of United States*, and *United States v. Moses*). On occasion he was so keen to find cases to guide him that he looked at decisions based on facts of which were not materially the same as those under consideration, as he did in *Bond v. The Cora*. His uncertainty was apparent in *Mott v. Maris* where he followed a state court decision about which he had doubts. In *Hylton v. Brown*, unable to find any direct authority, the court approached

informally two retired judges for advice. Further, in *Delancy v. M'Kenn*, Washington sought the advice of counsel unconnected with the case. These cases show the lengths to which he went to form an opinion.

His public expressions of doubt as to the correctness of his opinions in cases such as *Omlin v. Insurance Company of Pennsylvania*; *McFadden v. The Exchange* and *Consequa v. Williams* give the impression of a judge constantly looking over his shoulder to the Supreme Court and are in stark contrast to his robust indications to juries on factual issues which were not open to appeal and to his firm handling of the politically explosive cases of *Bright* and *Corfield*.

Criticisms of Washington's narrow interpretation of statutes, his rigid dependence on the doctrine of precedent, his uncertainty, and his lack of concern of the consequences to the parties of his opinions should be balanced against the undoubted benefits of stability which precedent brought to his circuit court. This meant that industrious counsel, willing to research the authorities, would have been well placed to advise their clients on the reasonable prospects of success of their litigation.

Because of his extensive grounding at the Bar and on the circuit bench, Washington approached his maritime opinions for the Court with more confidence as those cases generally depended on findings of fact rather than difficult points of law. He, alone, had to decide whether to accept or reject excuses for breaches of embargo or revenue laws. He was quick to see through spurious defences (*United States v. The Paul Sherman*) but willing to refuse forfeiture where the explanation appeared reasonable. (*Parker v. United States*; *United States v. Dixey et al*; *United*

States v. Morgan et al.). Overall, his enforcement of the embargo laws was more even-handed than his brother Story.

Washington's protection of existing property rights was demonstrated in *Milligan v. Dickson* when he refused to overturn many titles to land on a point of evidence and in *Gordon v. Holiday* he safeguarded from confiscation the title of an heir to an enemy alien. Generally his approach to land disputes was pragmatic and he waived minor irregularities whenever he could in order to preserve the status quo. (*Griffith v. Tunckhouser; Huidekoper v. Burrus; Willis v. Bucher et al; Torrey v. Beardsley*)

Washington's conservative Federalism was also evident in his promotion of commerce by the rules he laid down governing bills of exchange and promissory notes (*Craig v. Brown; Humhries v. Blight's Assignees; Perry et al. v. Crammond et al; McMurtry v. Jones*) and by his clarification of the law and procedure governing maritime contracts and marine insurance (*McGregor v. Insurance Company of Pennsylvania; Delaware Insurance Company v. Hogan; Vale v. Phoenix Insurance Co*).

Corfield v. Coryell and *United States v. Bright* were the two most significant circuit opinions Washington wrote. Not only do they reveal momentous constitutional issues facing the union, they show why it was prudent to have Supreme Court justices ride circuit to deal with such politically sensitive matters. The opinions are also notable because they present the normally diffident Washington in a new light. In *Corfield*, his restricting to its citizens the right to harvest the state's natural resources and his willingness to break new ground by a bold interpretation of the privileges and immunities clause of the Constitution reveal

a justice determined to preserve property rights. In *Bright*, by vehemently condemning a state's use of force to defy an order of a federal district judge, he made it plain that federal law was supreme and would be enforced.

Washington's view of his slaves as mere items of personal property was evident in his approach to the one opinion on slavery he wrote on circuit, in *Tryphenia v. Harrison*, when he was unable to see the harm to slave, sold to another master on a different Caribbean island. It is fair to observe that he strictly enforced the prohibition placed on the international slave by the Act of 1794 and declared slaves free for clear registration and residence breaches of the Pennsylvania 1780. Otherwise he had no impact on the plight of those already held to slavery within the United States.

In short, Washington's jurisprudence is well illustrated by his many surviving circuit opinions. His approach was dominated by precedent which provided the stability and uniformity he sought, despite occasional injustices. His opinions, whilst sometimes expressing uncertainty, reveal the importance to him of the supremacy of the national government and federal justice and the need for unanimity on the Supreme Court. They also disclose a resolve to preserve existing property rights and to seek economic prosperity by shaping contract law to promote inter-state and international trade.

Chapter Three

Brockholst Livingston: Consolidating Mercantile Law

Despite holding office as a justice of the New York State Supreme Court for five years and of the United States Supreme Court Justice for sixteen years, Brockholst Livingston is one of the lesser known associate justices of the Marshall Court and has been largely ignored by scholars. There has been no book-length biography and so little has been written about his life and cases that it is difficult to discern his jurisprudence without an examination of his state, federal Second Circuit and Supreme Court opinions. This will allow a discovery of his role in the resolution of the political and economic issues of the period and reveal how he developed the law to meet such challenges. Special attention will be paid to his time as presiding justice of the Second circuit and to those opinions he delivered which helped to shape the commercial law of the United States between 1802 and 1823.

The source of all references to Livingston in biographical dictionaries is a twelve page sketch written by Gerald T. Dunne in 1969 with four additional pages setting out the text of one New York and one Supreme Court opinion.¹ Dunne had earlier edited and commented upon ten letters passing between Livingston and Justice Story between 1812 and 1822 which touched upon circuit and Supreme Court business.² That is the extent of the scholarship on this Supreme Court Justice as no-one has taken up Dunne's call, forty-six years ago, for a biography of a man who had close connections with the 'Revolution, the evolution of the first political parties, the emergence of an authentically American *corpus* of commercial law, and

¹ Gerald T. Dunne, 'Brockholst Livingston,' in Friedman & Israel (eds.) *The Justices of the United States Supreme Court, 1789-1969*, vol. 1 (New York: Chelsea House Publishers, 1969), 387-403.

² Gerald T. Dunne, 'The Story-Livingston Correspondence,' *The American Journal of Legal History*, vol. 10 (1966), 224-236.

the institutional development of the Supreme Court under a Federalist Chief Justice with Democratic-Republican associates.³ G. Edward White's description in 1988 of Livingston as 'the third of the "silent" Justices of the Marshall Court's cohesive years,' may explain the reluctance of scholars to study him.⁴ Whilst Livingston was not amongst the first rank of the Marshall Court justices, for White to describe him as 'silent' and to place him with Justices Todd and Duvall does him a great disservice. This examination of all of his reported opinions from three jurisdictions begins a response to Dunne's suggestion for further research and demonstrates not merely a supportive acquiescent role on the Court but an active participation in the shaping of the substantive and procedural constituents of United States business law.

The Early Years: Political Allegiances: From Federalist to Republican

Livingston was born in New York City on the 25 November 1757 into one of the most distinguished and wealthy New York families, his father having been governor of New Jersey during the Revolution. Livingston was graduated B.A. from the College of New Jersey (now Princeton University) in 1774, with fellow student, James Madison, later to become the fourth president of the United States. His plan to study law was interrupted by service in the Continental Army. Having attained the rank of Lieutenant-Colonel at just 21 years of age, he served as an aide to General Benedict Arnold and witnessed the surrender of General John Burgoyne in 1777. Coming from such a privileged background it was only to be expected that he would support Federalist ideals.

³ Dunne, 'Brockholst Livingston,' 397.

⁴ G. Edward White, *A History of the Supreme Court of the United States, vols. III-IV: The Marshall Court and Cultural Change, 1815-1835* (New York: Cambridge University Press, 2010), 327. First published by Macmillan Publishing Company in 1988.

His adherence to the Federalist cause came under intense pressure between 1779 and 1782 while serving as private secretary to his brother-in-law, John Jay because of the extreme personal animosity between the two men. Livingston, who had an explosive temper, was frequently insolent towards his brother-in-law, and often made disparaging remarks about Congress to foreigners.⁵ This does not appear to be as a result of disillusionment with Federalist policies but more due to his extreme dislike of his brother-in-law. Jay, a leading Federalist was then United States Minister to Spain and later, in 1789, the first Chief Justice of the United States Supreme Court. He had been sent abroad in 1779 to obtain recognition and economic aid for the United States and when, in 1782, Jay left for France to negotiate the treaty which ended the Revolutionary War, Livingston returned home. On the voyage from Spain, Livingston's vessel was intercepted and he was captured by the British. Upon reaching New York he was held there for a time as a prisoner of war but was set free upon giving his parole to a British General, Sir Guy Carlton, a decision which required a letter of explanation to President Washington.⁶ The capture by the British in 1804 of a vessel in which Livingston had a substantial financial interest and her subsequent condemnation by a British Admiralty court caused him great inconvenience and an anxious wait of nine years before he

⁵ Whilst in Spain, Livingston's sister Sarah (John Jay's wife) wrote to their father of her 'discontent & disgust' at her brother's 'insolent' treatment of her husband and his bad behaviour generally, and of his disparaging remarks about the Congress to foreign visitors. In her letter she refers to 'my brother's temper I always knew to be irritable to an unhappy excess.' Letter, Sara Jay to William Livingston, Madrid, 24 June 1781 in Landa M. Freeman, Louise V. North and Janet M. Wedge, (eds.) *Selected Letters of John Jay and Sarah Livingston Jay* (Jefferson, North Carolina: MacFarland and Company Inc., Publishers, 2005), 107-108.

⁶ Friedman & Israel, vol. 1. 388.

recovered his losses after suing his insurers.⁷ It was a further event which did not endear him to Britain.

Upon his release Livingston began reading law in Albany under Peter Yates. Yates was an anti-Federalist delegate to the Continental Congress who spoke against ratification of the Constitution, and who later was appointed a state judge of the Western District of New York. While there is no evidence to suggest that Yates sought to bring Livingston within the Republican fold, he would have been exposed to his master's extreme political views. Livingston was admitted to the Bar in 1783, practising in New York until his appointment to the New York Supreme Court in 1802. He had an extensive practice at the Bar and in one murder case was co-counsel with Alexander Hamilton, later Secretary of the Treasury, and Aaron Burr whose main claim to fame, apart from killing Hamilton in a duel, was his appointment as Vice-President of the United States and subsequent trial for treason.

That Livingston had also been involved in at least two duels and had actually killed his opponent in a contest in New York in 1798 was not seen as a bar to his political or legal ambitions. His proficiency in law, his powerful family connections, and his ties to the wealthy of the City brought him success despite his lack of self-control. His relationship with John Jay further deteriorated when, in 1785, Jay sued and obtained judgment against Livingston for repayment of a loan and, during the course of the proceedings, accused him of insulting and libelling him whilst serving as his private secretary in Spain. The rift never healed.⁸ Livingston served as a Federalist on the New York Assembly between 1786 and 1789 and his

⁷ *Livingston & Gilchrist v. Maryland Insurance Co.*, 11 U.S. (7 Cranch), 506 (1813). A jury found against Livingston in the Maryland Circuit Court but the Supreme Court (which Livingston has just joined but recusing himself) ordered a new trial on the ground of the justice's misdirections.

⁸ Walter Stahr, *John Jay* (New York: Hambledon & Continuum, 2005), 231.

political and professional prospects were enhanced when on July 5, 1789, he delivered the first Independence Day oration in St. Paul's Church, New York to an audience which included President Washington and members of Congress.

Jay, having served three years as Chief Justice of the United States Supreme Court, and tired of riding circuit, ran for the governorship of New York State in 1792. It was a bitter campaign and he was narrowly defeated. Livingston and others had argued successfully that crucial and potentially decisive votes cast for Jay in Otsego County should not be counted because they had been delivered by a sheriff whose commission had expired. This led Livingston's sister (Jay's wife) to complain that she felt that he had disgraced the Livingston name by his opposition to his brother-in-law.⁹ It is clear that within a few short years Livingston would have a political party, led by Jefferson and Madison, to further his ambitions and to support in his vendetta against Jay.

Jay was elected governor in 1795 and was re-elected in 1798 despite Livingston's open and vocal support for opponents in both elections. One of the principal features of the ten year treaty Jay negotiated with Britain in 1794 was the strengthening of trade between the two countries. Although passed by the Senate and ratified by President Washington, the treaty was opposed by Republicans in every state, fearing that close links with monarchic Britain would undermine republicanism. They favoured France in the European wars and Jefferson's hatred of Britain was such that he hoped that the French would invade England to establish liberty and republicanism throughout the island.¹⁰ Livingston echoed Jefferson's

⁹ Freeman, *Selected Letters*. Letter, Sarah Jay to John Jay, 10 June 1792, 211.

¹⁰ Henry Augustine Washington, *Writings of Thomas Jefferson*, vol. IV (New York: Derby & Jackson, 1859). 118.

sentiments by roundly condemning the treaty during Jay's 1795 election campaign, support which was noted by the future President and rewarded in 1807.¹¹

Livingston's political prevarications were not unusual. Justices William Johnson, Story, and Thompson were disappointments to the Republican presidents who had nominated them because of their failure to uphold state sovereignty vigorously and by generally falling in line with the Federalist agenda of the Marshall Court. These changes in political allegiance cast light on the political fluidity of the period when earlier expectations of how the Constitution would be interpreted had yet to be met. However, Samuel Chase's conversion to Federalism from fierce opposition to the Constitution because it infringed state sovereignty was due in large measure to his wish for federal judicial office.¹²

A good illustration of swings in political affiliations is that of the fourth president, James Madison. His drafting of the Constitution and the Bill of Rights coupled with his crucial role in the Virginia Ratification Debate placed him as a committed Federalist supporting the notion of a strong national government with authority over the states.¹³ The first clear evidence of political change is his opposition to an all-powerful central authority contained in an essay he wrote in 1792 labelling members of his former party as the 'anti-Republican party,' and as 'stupid, suspicious, licentious' and 'accomplices of atheism and anarchy.'¹⁴ The Alien and Sedition Acts of 1798, passed in the aftermath of the French Revolution

¹¹ Timothy L. Hall, 'Henry Brockholst Livingston,' in *Supreme Court Justices: A Biographical Dictionary* (New York: Facts on File Inc., 2001), 56.

¹² James Haw & Ors., *Stormy Patriot: The Life of Samuel Chase* (Baltimore: Maryland Historical Society, 1980), 174-175. Stephen B. Presser, *Studies in the History of the United States Courts of the Third Circuit* (Washington D.C: The Bicentennial Committee of the Judicial Conference of the United States, 1982), 37-38.

¹³ Jack N. Rakove (ed.), *Madison: Writings* (New York: Library of America, 1999). Involvement in; Framing and Ratifying the Constitution, 357-358; Federalist Papers Nos. 41-46 226-272; Virginia Ratifying Debate (Judicial Power), 393-400; Constitutional Amendments (Bill of Rights), 437-452.

¹⁴ *Ibid*, 'Who are the Best Keepers of the People's Liberties?' 532-534.

and war with France were designed to strengthen national security but were misused by the Adams administration and the federal courts to prosecute Republicans who ventured to criticize the president or members of his government.¹⁵

Madison countered the misuse of those acts with an anonymous drafting in December 1798 of the *Virginia Resolution against the Alien and Sedition Acts* declaring them to be unconstitutional and asserting the right of states to ‘interpose for arresting the progress of the evil.’¹⁶ Having been elected president in 1807 Madison moderated his extreme views and attempted to strike a balance between the power of central government and respect for the powers of the states.¹⁷ Whilst Madison is an extreme example, it does reveal how political views can change when new responsibilities are assumed, whether it be the presidency or high judicial office. It explains why justices after appointment might be more concerned with the stability of government underpinned by a viable judicial system rather than fulfilling party expectations. The fact that, by virtue of Article III, Section 1 of the Constitution, the justices held office during good behaviour gave them the independence to act in a manner they believed beneficial to the nation, unlike many state judges whose tenure depended upon the whim of the legislature, party backers, and the electorate.

Livingston’s ability as a lawyer aside, a seat on the state Supreme Court seemed likely through family connections as Edward Livingston was mayor of New

¹⁵ Section 2 of an Act for the Punishment of Certain Crimes Against the United States, approved July 14, 1798 in Richard Peters, (ed.), *The Public Statutes at Large of the United States of America*, vol.1 (Boston: Charles C. Little & James Brown, 1845), 596-597.

¹⁶ *Virginia Resolution* approved by the Virginia House of Delegates December 21, 1798 in Rakove, *Madison: Writings*, 589-591. Jefferson went further in his draft of the *Kentucky Resolution* by actually threatening nullification and suggesting that legislation deemed by the states to be unconstitutional ‘might drive these states into revolution and blood,’ This was the way in which he acted even while Vice-President under John Adams. See Merrill D. Peterson, *Jefferson: Writings* (New York: Library of America, 1984), 453-454.

¹⁷ First Inaugural Address in Rakove. *Madison: Writings*, 681.

York and three Livingston in-laws, Thomas Tillotson, Morgan Lewis and Smith Thompson were, respectively, Secretary of State of New York, Chief Justice and Associate Justice of the New York Supreme Court. In the event his elevation was due to Republican and not Federalist patronage. Following his support of Republican candidates and opposition to John Jay, Livingston helped carry New York for Thomas Jefferson during the presidential elections of 1800 and he spoke publicly for Jefferson and against President John Adams. Jay's son, Peter, recorded that Livingston, as voting took place, 'made speeches to the mob, though he himself was one of the candidates.'¹⁸ It would appear that the transition from Federalist to Republican was complete.

Commercial Law for New York State

In 1802 Livingston joined family members Morgan Lewis and Smith Thompson on the bench of the New York Supreme Court. He had the good fortune to have as a colleague on that bench, James Kent, one of the greatest legal minds of his generation which will have greatly enhanced the experience. The New York Supreme Court consisted of a Chief Justice and four associates which, when all justices sat, enabled the handing down of a majority opinion. The law reports reveal that on occasions because a justice was absent through illness, or a recently appointed justice had not heard the arguments of counsel, or had been counsel in the case, no opinion could be delivered because the court was evenly divided. In *Jackson v. Horton* (1805) the problem of an equally divided court was overcome by counsel turning the dispute into a special verdict for determination by the Court for

¹⁸ Letter, Peter A. Jay to John Jay, 3 May 1800 in Stahr, *John Jay*, 360.

the Correction of Errors, much in the same way as a disagreement between federal circuit and district judge was placed before the United States Supreme Court on a certificate of division of opinion.¹⁹

A very dubious method of resolving the embarrassment of an equally divided court occurred in *Jackson v. Munson* (1806), a case involving land forfeited for adhering to the enemy. The case is extraordinary for a breach of the protocol that a justice who had appeared for a party in the court below should play no part in the appeal. The reports of George Caines and William Johnson contain numerous examples of recusals for this specific reason. Despite the convention, Justice Spencer, who had appeared earlier as counsel for the Defendant, broke the deadlock by holding in favour of his former clients, deciding that they were entitled to compensation for improvements to land. He may well have come to the correct decision but justice was not seen to be done. He regretted delivering an opinion remarking that he did so ‘reluctantly.’ His remorse would have been of little consolation to the losing plaintiff.²⁰

The law reports of Caines and Johnson give the names of the justices who gave the opinion of the court, who concurred and of those who dissented. However, those reports reveal that a greater number of the opinions were delivered *per curiam* (by the court) without naming any justice. For example between May and October 1811 of a total of 304 opinions handed down only 19 were attributable to specific justices. Justice Livingston wrote 149 opinions whilst on the New York Supreme Court and, when considered with the 47 reported cases from the Second Circuit between 1808 and 1822 and the 38 majority opinions, six concurrences, and eight

¹⁹ *Jackson v. Horton*, Caine’s Reports. Vol. 3, 202. August 1805.

²⁰ *Jackson v. Munson*, Johnson’s Reports, vol. 1, 283. May 1806.

dissents he delivered in the United States Supreme Court, provide a reasonable insight into his jurisprudence. An examination of the significant output from his time on the state court reveals his own vision for the development of the law, his attitude towards jury verdicts, and the dynamics of decision making in New York at the beginning of the nineteenth century as well as his grounding in all aspects of commercial law.

The New York Supreme Court judges were kept extremely busy. Not only did they hear appeals, like the United States Supreme Court justices, they were obliged to ride circuit and this they did throughout New York State trying, generally with a jury, civil and criminal cases at first instance. The judges also sat on the New York Court for the Trial of Impeachments and Correction of Errors which heard appeals from the state supreme court and the chancery court. There was no separation of powers within the Court for the Correction of Errors which was predominantly a political body, comprising the Lieutenant Governor, members of the New York Senate, the Chancellor and the justices of the state supreme court.

This hierarchy made it possible for a judge to try a case on circuit, sit on the appeal or writ of error to the state supreme court and, finally, be permitted to explain his reasoning to the Court of Correction of Errors but not have a say in the final outcome.²¹ An examination of the state court opinions reveals numerous instances where judges not only sat on appeals from cases they tried at first instance but also gave the opinion of the state supreme court affirming their original ruling. This, as in the United States Supreme Court, was considered perfectly acceptable and the only time a judge refrained from delivering an opinion was when he had a financial

²¹ New York Constitution, 1777, Article 33.

interest in the outcome, was related to one of the parties to the suit, or had been counsel in the case at first instance.

Article 25 of the New York Constitution of 1777 provided for the continued use by state courts of British statute and case law which had been adopted by the colony prior to April 19, 1776, subject to any amendments by the state legislature. It follows, therefore, that the New York State Supreme Court reports are dominated by constant favourable references to the decisions of British judges and writers. The reports reveal that Hale, Blackstone, Lords Mansfield, Holt, Ellenborough and Kenyon, were generally held in high regard by Livingston and Thompson.²² This was to be expected given that the legal education of lawyers of this period was based on Hale's *Pleas of the Crown* and Blackstone's *Commentaries on the Laws of England*. Livingston was willing to follow post-1776 British authorities remarking in the marine insurance embargo case of *Penny v. New York Insurance Company* (1805) that he was willing to adopt the English rule despite it being post Revolution and not on the grounds of authority but merely because it was the most reasonable approach to the problem.²³ He did not always follow English decisions. In *Leroy v. Lewis* (1803) Livingston pointedly announced that he had not founded his judgment on a British decision but on a former decision of the state supreme court.²⁴

When dealing with admiralty and marine insurance cases Livingston was quick to protect insurance companies by examining carefully potentially fraudulent claims such as the subsequent insuring of a vessel lost at sea and spurious

²² The law reports of the New York Supreme Court and the Court for the Correction of Errors upon which this aspect of the research is based comprise: George Caines, 3 vols. May 1803-November 1805, 3rd ed. revised by William G. Banks (New York: Banks and Bros. Law Publishers, 1883-1885); William Johnson, 3 vols, 1799-1803 and 20 vols, 1806-1823. These two law reporters cover the periods on the state court by Justice Livingston, 1802-1806 and Justice Thompson, 1802-1818.

²³ *Penny v New York Insurance Company*, Caines, Vol III, August 1805. 157.

²⁴ *Leroy v. Lewis. May 1803*. Caines, 175.

explanations for route deviations. Thus in *Watson v. Delafield* (1804) he sent out a clear warning that a partner who knew that a vessel had been lost was under a strict duty to inform the other partner of the crucial fact to prevent him from arranging ineffective insurance.²⁵ His expertise in marine insurance was gained by dealing with issues such as the seaworthiness of a vessel at the beginning of a voyage; whether a mere intention to deviate from an agreed route avoided the policy; who was to pay for seamen's wages and provisions after capture by the enemy; and the duty to insure a vessel against the need for repairs on voyage. The list is not exhaustive as the reports reveal all manner of maritime issues. What is clear is that he was well prepared to deal confidently with admiralty matters upon his elevation to the Marshall Court.

Livingston's state opinions on commercial law underpinned the status of partnership which he believed to be crucial to the development of trade and industry, being aware of the need to protect one partner against the fraud or incompetence of another. In *Green v. Beals* (1804) he held that one partner could not execute a bond without the express authority of the other as this would permit him to dissipate the partnership assets, declaring that it would otherwise render partnerships more dangerous than they were already and might even discourage them altogether.²⁶ He continued this theme in *Casey v. Brush* (1805) by refusing to allow a claim by one partner against another in respect of a 'joint transaction' when the other had not expressly consented to the venture.²⁷ The protection thus afforded by the court

²⁵ *Watson v. Delafield*, November 1804, Caines, Vol. II, 224. See also *Livingston v. Delafield*. Caines vol. III. p. 53 which turned on the question of whether the insured knew that the vessel had already perished.

²⁶ *Green v. Beals*, Caines, vol II. November 1804, 255.

²⁷ *Casey v. Brush*, Caines. Vol II, February 1805, 295.

would allay the fears of and reassure the competent and careful member of a partnership.

Trade and the maintenance of government revenue required a substantial body of federal officials to supervise all aspects of commercial life from seizing goods shipped in breach of embargo or non-intercourse laws or the avoidance of customs duties to the inspection of foodstuffs to ensure they were fit for human consumption. In *Henderson v. Brown* (1803) a revenue collector was sued personally for trespass when he levied execution on a theatre which was wrongly described as a dwelling-house in a list he had been given. Thompson held the collector liable but Livingston favoured the majority view that a government official should not be held liable for the mistakes of his superiors and be put in a position where he looked to his employers for ex gratia recoupment.²⁸ He confirmed his belief that public officials acting in good faith should be protected in *Seaman v. Patten* (1805) when observing that the court would protect from liability government employees who acted mistakenly but honestly in the performance of their duties. In that case an inspector wrongly condemned a quantity of beef. Livingston directed the jury that the inspector should not be held liable unless he acted with malice as it 'seems cruel not to protect them when they act with integrity.'²⁹ Thus, a trader who had suffered loss due to the incompetence of an honest official had no redress.

Justices, whether on state or federal courts, generally tried cases with a jury and the verdict, if disputed, fell for review before the state supreme court and later the United States Supreme Court. The jury system was the cornerstone of the United States justice system and, as far as criminal trials were concerned, that crucial

²⁸ *Henderson v. Brown*, May 1803. Caines, vol. I, 94.

²⁹ *Seamen v. Patten*, Caines, vol. II. February 1805. 314.

protection of the citizen was enshrined in Article III, Section 2 of the Constitution. Most judges considered the verdict of a jury, in civil and criminal cases as sacrosanct and were reluctant to inquire into the jury's deliberations, not welcoming evidence of misconduct. Justice Washington, as has been noted earlier, announced that in sixteen years sitting on circuit in Pennsylvania a jury had reached a verdict contrary to the opinion of the court on two occasions only.³⁰ Furthermore, Washington in *Harrison v. Rowan* refused to look into affidavit evidence from jurors complaining that they had been pressured by other jurors to reach a verdict. Washington would not interfere with a verdict solemnly delivered in court.³¹

Judges burdened with heavy dockets would not wish to re-open cases, some of which had been determined after lengthy argument and consideration. Livingston, however, did not believe that juries were infallible and was prepared to hear of irregularities in their deliberations, and, in obvious cases, would set aside the verdict and order a new trial. Thus, in *Smith v. Chetham* (1805) he delivered the court's opinion setting aside a jury's verdict of damages in a libel action condemning it as a verdict based on 'chance or lot' and not one based on 'reflection.' In that case a constable supervising a jury in retirement reported that the jury could not agree on an appropriate award of damages so each juror put forward his figure and the aggregate was divided by twelve. Livingston's concern was that litigants were entitled to a verdict based on the evidence and if they could not rely on jurors doing their duty, they might resort to more intemperate means of obtaining redress. In the course of his opinion Livingston took the opportunity of rehearsing the many instances, both in the United States and England where verdicts had been set aside

³⁰ *Willis v. Bucher*. 30 F. Cas. 63 (Penn. April 1818).

³¹ *Harrison v. Rowan*, 11. F. Cas. 663 (New Jersey, April 1820).

because of jury misbehaviour including the case of *Mellish v. Arnold* in which the jury decided whether \$200 or \$300 was appropriate by tossing up a cross and a pile.³²

In the same month Livingston, for the court, set aside another jury verdict in the land dispute of *Brandt v. Ogden*, describing it as palpably wrong and against the weight of the evidence. The jury had disregarded the evidence of four wholly independent witnesses and had preferred the evidence of a single witness who had an interest in the outcome of the proceedings.³³ In *Smith v. Chetham*, when referring to judges' unwillingness to question surprising jury verdicts, Livingston wondered 'why judges are so tender of the jury.'³⁴ The use of this phrase indicated that he recognized that jurors were not above human frailty and he was not was prepared to treat all jury verdicts as inviolable. It may also reveal a lack of faith in the jury system from one whose wealthy background gave him a sense of superiority and the confidence to question the ability of ordinary citizens to properly evaluate evidence and put aside prejudices. His willingness to overturn jury verdicts sets him apart from his brethren.

When considering the range of cases which form the basis of Livingston's experience on the New York Supreme Court between 1802 and 1806, it is important to look beyond the 149 opinions he handed down because in five years he sat on over 1,000 cases covering virtually every conceivable point of law. He will have participated in the many *per curiam* opinions and listened to the arguments in and heard and contributed to the opinions delivered by fellow justices. In Livingston's

³² *Smith v. Chetham*, Caines. Vol. III. May 1805. p. 58; *Mellish v. Arnold*, Bumb. 51.

³³ *Brandt v. Ogden*, Caines, vol. III. 10. May 1805.

³⁴ *Smith v. Chetham*, supra, 60.

final year on the court, opinions were delivered on 252 cases.³⁵ It follows that Livingston's expertise extended far beyond the points of law involved in his own opinions and his New York apprenticeship well prepared for him the challenge of the Marshall Supreme Court. Justice Livingston came to the Marshall Court in February 1807, bringing with him his experience as an advocate and five years as a puisne and appellate associate justice of the New York court and considerable experience in commercial and admiralty law.

A Republican on a Federalist Supreme Court

President Jefferson was determined to fill any vacancies on the Supreme Court with committed Republicans in an effort to balance its political composition and to ensure that the Court did not rival the legislature and the executive in power and influence. Although Jefferson considered Livingston as a possible replacement for Justice Alfred Moore in 1804, he nominated the more experienced William Johnson of South Carolina. When a vacancy arose in 1807 upon the death of Justice William Paterson, Jefferson had no hesitation in naming Livingston who had demonstrated, by his political activity in New York, that he was a man dedicated to the Republican cause. Upon appointment Livingston went on the Second Circuit which meant that in addition to his sittings in Washington on the Supreme Court, his previous New York state circuit travels were extended to include Connecticut and Vermont. He, as did other circuit justices, suffered the physical hardship associated with travelling circuit. Apart from the discomfort of travelling many miles on very poor roads, he

³⁵ William Johnson, *Reports*, vol.1.

was on one occasion badly injured. He wrote to Justice Story in 1813 that he was suffering violent persistent headaches arising from a stage coach accident.³⁶

Livingston's federal circuit opinions will have run into many hundreds but only a very small number have survived to the *Federal Cases*, in turn extracted from the reports of Elijah Paine Jnr published in 1827.³⁷ Paine's reports contain only one case from the April 1813 term at Connecticut despite the fact that the lists were long. This was revealed in letter written by Livingston to Joseph Story at the end of that term in which he wrote, 'I have had a very busy term in Connecticut & have no doubt laid the foundation for some trouble for yourself and my other brethren at Washington.'³⁸ Also there are only four Vermont cases reported, through the whole of Livingston's tenure, strongly suggesting the absence of a law reporter in that district. The remaining reported cases are almost equally divided between New York and Connecticut. This lack of reporting of federal cases in the early years contrasts sharply with the abundance of law reports emanating from the New York Supreme Court who had appointed George Caines as its law reporter in 1804. He was the first official law reporter anywhere in the United States.³⁹ The United States Supreme Court did not appoint an official law reporter, Henry Wheaton, until 1817.⁴⁰ Despite the paucity of reported federal circuit opinions of Livingston, there is a sufficient

³⁶ Letter, Livingston to Story, 23 April, 1813 in Dunne, 'Story- Livingston Correspondence,' 226.

³⁷ Elijah Paine Jnr., *Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit: Comprising the Districts of New York, Connecticut and Vermont*, Vol. 1 (New York: R. Donaldson, 1827).

³⁸ Gerald T. Dunne, 'The Story-Livingston Correspondence, *American Journal of Legal History*, Vol.10. No. 3 (1966), 224-236, 226.

³⁹ Gaines produced three volumes of law reports covering decisions from May 1803 to November 1805. He was succeeded by William Johnson who between 1806 and 1822 edited 20 volumes of New York Supreme Court reports. www.courts.state.ny.us/reporter/History/page_24.htm (accessed 12/08/2013). James Kent believed that Gaines was incompetent and appointed Johnson who proved to be an excellent law reporter. (John H. Langbein, 'Chancellor Kent and the History of Legal Literature, *Columbia Law Review*, vol. 93. No. 3 (1993) 547-594, 575 & 578-9).

⁴⁰ Erwin C. Surrency, 'Law Reports in the United States,' *American Journal of Legal History*, Vol. 25, No. 1 (1981) 48-66, 56.

number when taken with his state court opinions to discern patterns of court business as the reported cases appear to have been written up at random covering most branches of law and including cases both significant and ordinary.

President Jefferson had hoped that the appointment to the Court of Republican William Johnson in 1804, followed two years later by the anti-Federalist Livingston would go some way to curb what he saw as the excesses of a Federalist dominated Court. Whilst Justice Johnson pleased Jefferson by delivering dissents and separate concurrences, he had the temerity to censure an executive order of the President in an 1808 embargo case in the circuit court at Charleston. This incurred the wrath of the President and his Attorney General, Caesar A. Rodney. Jefferson distributed widely to the press the Attorney General's opinion undermining Johnson's decision. Rodney wrote to Jefferson complaining that Johnson had 'enlisted fairly under the banner of the Judiciary, and stands forth the champion of all the *high church* doctrines on the Bench.' He referred to what he perceived as a Federalist stance taken by Johnson in that case as a 'disease' and further protested that 'you can scarcely elevate a man to a seat in a Court of Justice before he catches the leprosy of the bench.' Rodney wished to know whether the President wished him to use the press to further undermine Johnson.⁴¹ This typical reaction of President Jefferson and his Attorney General reveals not only the political pressures faced by justices on circuit but also the complete failure of some politicians to understand or accept the concept of an independent judiciary.

⁴¹ The Charleston circuit case was; *Ex parte Gilchrist*, Federal Cases no. 5420. Letter of Attorney General Rodney to President Jefferson, October 31, 1808 Jefferson Papers MSS cited in Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston: Little Brown, and Company, 1926), 336-337.

The President suffered further disappointment when Livingston deserted the Republican cause, reverting to the Federalist principles of his youth. It is reasonable to argue that Livingston's hatred of the arch-Federalist John Jay and support of any person who opposed Jay gave the impression that he had espoused a new political philosophy when, in fact, the protection of existing property rights, the promotion of commercial activity, and the need for a strong federal government were Federalist ideals he never abandoned.

Jefferson's nomination having been confirmed by the Senate on December 13, 1806, Livingston went from the highest court in the state to the nation's highest tribunal, taking his seat on the Court in the February 1807 term. He brought with him a confidence flowing from five years as a New York State trial and appeal court judge. It was a confidence readily apparent to Story who, whilst still an advocate, saw him in action in Washington just one year later. Despite the fact that Story was generally fulsome in his praise of all others, Livingstone made a particularly deep impression on him. Story, having spent a day observing the Court in action, wrote to a friend in 1808, describing the new justice, and future colleague, as 'a very able and independent judge. He evidently thinks with great solidarity and seizes on the strong points of argument. He is luminous, decisive, earnest and impressive on the bench.'⁴² Livingston's experience on the state supreme court was clearly much in evidence. He was not the timid new boy.

Livingston's opinions have a refreshing lack of prolixity and an absence of convoluted language. Unlike many of his colleagues, he kept his opinions short and the content clear. His use of language is what one might expect of a much later age.

⁴² Letter, Joseph Story to Samuel P.P. Fay, February 25, 1808, in William W. Story, *Life and Letters of Joseph Story*, Vol.1 (London: John Chapman, 1851), 167.

A good way of illustrating his crisp and clear style is by contrasting his approach to an issue upon which there has been no definitive legal precedent with Justice Washington's much lengthier plaintive discourse. In the New York circuit court bankruptcy case of *Adams v. Story*, Livingston wrote, 'After all that has been said, the court considers this question as one of considerable difficulty and regrets that it has not yet received a decision at Washington, which would produce uniformity of judgment; at least in the courts of the United States.'⁴³ In the Pennsylvanian circuit case of *Odlin v. Insurance Co. of Pennsylvania* (1808) Justice Washington when faced with the absence of legal authority wrote,

It is admitted that this precise case has never received a judicial decision in any courts of Great Britain or the United State, although it has been frequently glanced at by the judges; from whom, however, nothing beyond hints of their opinions can be collected. We are sensible of the difficulty of the question, as well as its importance to the parties, in this and other similar cases; we derive consolation, however, from reflecting that our opinion, if wrong, is subject to revision elsewhere.⁴⁴

The difference in style, language, and brevity is marked. Washington is more representative of judicial opinion writing of the time, although the impression he gave of a lack of confidence, expressed on more than one occasion, is not.⁴⁵

Livingston's opinions were further enhanced by his elegant humour which was shown at its best in his dissent in the New York Supreme Court case of *Pierson v. Post* (1805), a decision which retains a place in the textbooks of American law students today. The case involved a dispute over the ownership of a fox pursued by one man and slain by another who came in at the end of the chase. Thompson, Livingston's brother in law and the justice who was to replace him on the United

⁴³ *Adams v. Story*, 1 F. Cas. 141 (New York, April 1817).

⁴⁴ *Odlin v. Insurance Co. of Pennsylvania*, 18 F. Cas. 583 (Penn, October 1808).

⁴⁵ *McFaden v. The Exchange*, 16 F. Cas. 85 (Penn. October 1811). 'I feel cheered that the error of my judgment, if I have committed one, will be corrected by a superior tribunal.'; *Consequa v. Willings*, 30 F. Cas. 55 (Penn. October 1816). 'I shall not be afraid of adding another precedent, leaving it to the Supreme Court, where I perceive this cause is likely to go, to correct this court, if I am wrong.'

States Supreme Court, gave the Court's opinion in favour of the man who killed and carried away the fox. Livingston began his dissent by observing that the case ought to 'have been submitted to the arbitration of sportsmen, without poring over Justinian, Fleta, Bracton, Pufendorf, Locke, Barbeyrac, or Blackstone, all of whom had been cited.' As to the character of the fox, he continued, 'Both parties have regarded him, as does the law of nations, as a pirate. His depredations on farmers...have not been forgotten...Hence ...our decision should have in view the greatest possible encouragement to the destruction of an animal so cunning and ruthless in his career.'⁴⁶ He was more able to express humour in a case of little moment pursued by men with money to spend and time on their hands.

Livingston spent his entire tenure of the circuit court sitting in New York City; New-Haven and Hartford in Connecticut; and Burlington, Rutland and Windsor in Vermont. He was fortunate in having the same district judge sitting with and supporting him in each seat throughout; Elijah Paine in Vermont and Pierpoint Edwards in Connecticut. District Judge William P. Van Ness sat with Livingston for thirteen years in New York.⁴⁷ The district judges who were obliged by Congress to be local residents were familiar with and would make the circuit judge aware of local trade customs and specific problems.

Constitutional cases were rare on circuit and there are only two reported decisions touching upon the constitutionality of state laws. In *Fisher v. Harnden* (1812), a New York grand jury found an indictment against Fisher, a British subject, that he had adhered to the enemies of the state and in October 1783 judgment was

⁴⁶ *Pierson v. Post*, 3 Gai. R. 175 (1805).

⁴⁷ The names of and dates of service of the district judges and the court venues are taken from Edwin C. Surrency, *Federal District Court Judges and the History of Their Courts*. This is a privately printed essay entitled, 'History of the Federal Courts Pamphlet #1, 1996 which in turn is based on a combination of the following essays; 1. 28 *Missouri Law Review*, 214 (1963) and; 2. 40 *Federal Research Division*, 139 (1966).

signed forfeiting all of his real and personal estate. Fisher died in 1798 leaving his heirs, also British subjects, in possession of his land. However, by the Treaty of Peace between the United States and Great Britain signed on 3 September 1783 any confiscation proceedings after the signing of the act were void. Livingston having charged the jury that the adoption of the treaty by the United States operated as a repeal of state law and the judgment was void, the jury found for Fisher's heirs.⁴⁸ The opinion illustrates a shift in Livingston's political ideology in that, despite his background as a state judge and politician, he did not seek to impose upon the case the Republican tenet of state sovereignty and acknowledged the supremacy of federal law over state legislation unless it violated the federal Constitution.

Livingston took the opposite view in his other constitutional case, *Adams v. Story* (1817). This was by far the most important opinion Livingston wrote whilst on circuit and the only case in which Livingston expressly regretted the absence of Supreme Court precedent.⁴⁹ In that case Livingston upheld the right of New York State to pass an insolvency law which discharged debtors from liability in respect of debts contracted either before or after the passing of the act, and which purported to bind out of state creditors. In so doing, by emphasizing the differences between bankruptcy and insolvency, he rejected arguments that the state law was in effect a bankruptcy measure contravening the right of Congress to 'establish a...uniform law on the subject of bankruptcies throughout the United States.'⁵⁰ He also refused to accept the proposition that the state insolvency law was an unconstitutional impairment of the obligation of contract.⁵¹ He used his opinion as a means of exploring the historical context justifying the granting of relief to debtors from the

⁴⁸ *Fisher v. Harnden*, 9 F. Cas. 129 (New York, April 1812).

⁴⁹ *Adams v. Story*, supra, n.7.

⁵⁰ Article 1, Section 8 of the Constitution of the United States.

⁵¹ Article 1 .Section 10 of the Constitution of the United States.

time of the first colonists from Britain until its universal adoption by every state of the Union. He felt very strongly about the issue believing that if there was no relief from debt and imprisonment for debt, the debtor would sink under the burden and make no effort to begin anew and contribute to the general good. This opinion was music to the ears of Republicans as Livingston was asserting the right of a state to legislate without federal government interference unless in clear violation of the federal Constitution.

However this particular Republican tendency was short lived. His feeling was not sufficiently strong to compel him to dissent when the same issue was dealt with by the Court in *Sturges v. Crowninshield* two years later. Chief Justice Marshall, writing for a unanimous Court, held that a state law expressed to grant relief to a debtor in respect of debts accruing before the passing of the law was an impairment of the obligation of contract and therefore unconstitutional.⁵² He was less forthcoming as to whether the sole power of passing bankruptcy laws resided in the states or in Congress. Prefacing his remarks with the phrase, ‘Without entering further into the delicate inquiry,’ he limited himself to holding that until Congress passed uniform bankruptcy laws, the states were not forbidden to pass a bankruptcy law provide it did not infringe the Constitution. He did not think it necessary to rule on whether the law in question related to bankruptcy or insolvency.

The ‘delicate’ nature of the inquiry was revived in *Ogden v. Saunders* (1827), which, whilst it occurred after Livingston’s death, is examined because it reveals the judicial compromises in *Sturges*. When Justice Johnson delivered the Court’s opinion in *Ogden* he felt the need to explain how the justices had reached a decision in the earlier case. He wrote that the Court in *Sturges* was ‘greatly divided in its

⁵² *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

views of the doctrine, and the judgment partakes as much as a compromise as of a legal adjudication. The minority thought it better to yield something than risk the whole.⁵³ The minority he referred to were those justices who supported the right of states to pass bankruptcy laws, of which he was one, having so held on circuit, and Livingston, another, because of the views he expressed in *Adams v. Story*. The compromise was the willingness of Johnson and Livingston to join in the holding of impairment of contract in return for the remaining justices agreeing that the states had the power to pass bankruptcy laws, at least until Congress exercised that power. The case shows that, rather than acting as Jefferson had hoped, as a thorn in the side of a Federalist dominated Court, Livingston was prepared to acquiesce in the general view, despite his own feelings, in an effort to strive for that unity which would enhance the authority of the Court in the eyes of the nation.

There is a pattern to the six reported criminal cases which Livingston tried on circuit. The cases reveal a strict interpretation of the criminal law in favour of a defendant, particularly in cases where death would follow conviction. In thirteen years, Livingston presided over many criminal cases, the details of which have not survived because of the lack of a law reporter. One must always exercise caution before reaching conclusions on such a very small sample. We know, however, that the six surviving reports of criminal cases, taken with some other circuit opinions, reveal a jurisprudence founded, wherever possible, on a compassionate view of men and their failings.⁵⁴

⁵³ 25 U.S. (1827), 272-273.

⁵⁴ See, *United States v. Hoxie*, 26 F. Cas. 397. Vermont, October 1808; *United States v. Bass*, 24 F. Cas. 1028. New York 1819; *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 164-183 (1820); *United States v. Porter*, 27 F. Cas. 598. Connecticut 1818; *United States v. Phelps*, 27 F. Cas. 526. Connecticut 1810; *United States v. Skinner et al.*, 27 F. Cas. 1123. New York 1818.

Livingston also demonstrated a pragmatic perspective in two revenue cases with a commercial law aspect. He reversed forfeiture orders made by district judges accepting, in one case that shippers had entered goods in the New York customs house at less than the correct quantity because the goods had been packed in haste in France due to a real danger of pillage by advancing Prussian troops.⁵⁵ In the other case he took the view that a valuation of imported goods based on the cost of raw material, labour and shipping as opposed to the likely sale price was a sufficient estimate worth as to avoid forfeiture for breach of customs law.⁵⁶ Lest it be thought that Livingston was gullible, the manner of his rejection of some of the more bizarre explanations of masters for route deviations in maritime embargo cases shows him to be an astute observer of human nature.

There were fourteen maritime cases in the forty-eight reported circuit opinions. By far the most revealing is *United States v. The James Wells* (1808) in which Livingston was not disposed to accept a master's explanation for breaching the embargo by arriving in the West Indies instead of Georgia because of the leaking condition of his vessel. Livingston found that the cargo had been chosen for the West Indian market and that holes had been bored into the ships bottom to support the deviation from route. The case is noteworthy not only for Livingston's robust attitude to this class of case but also for Livingston's comments on the difficulties facing judges who under the embargo act tried cases without a jury. Despite a willingness on occasion to set aside jury verdicts, he found the responsibility of having to decide law and fact a burden but stressed the importance of ensuring that laws were not broken with impunity. He set out the difficulty facing a judge alone construing penal statutes and of the temptation of one who might not have the

⁵⁵ *United States v. Nine Packages of Linen*, 27 F. Cas. 154 (New York, April 1818).

⁵⁶ *Ninety-five Bales of Paper v. United States* ,

firmness to enforce a statute and who mitigated the severity of it instead of bearing down hard.⁵⁷ He was not timid in enforcing breaches of sailing licences even if it meant the forfeiture of vessel and cargo.

In *The Active* (1809) Livingston had no hesitation in forfeiting a vessel for breach of commercial fishing licences; the vessel had been passed for cod fishing had been found carrying other goods.⁵⁸ The following year in *The Elizabeth* he affirmed the district judge's forfeiture order in respect of a vessel licensed only to sail on the Hudson River and which had been found 110 miles from New York in the Long Island Sound carrying goods for which no manifest had ever been delivered. He refused to hold that the embargo laws, which had a vast impact on commercial life, were unconstitutional, observing that he would never come to that conclusion, unless, 'it were scarcely possible for any two men to differ in sentiment on the subject' which was another way of saying that it was a matter for the United States Supreme Court.⁵⁹

Of the fourteen reported maritime opinions, two were simple breaches of licences to trade and in those cases, Livingston affirmed forfeiture orders. However, in nine embargo opinions, Livingston affirmed the district judge in two but reversed forfeiture orders in the remaining seven cases. Those reversals and the five directed acquittals in criminal cases, albeit a very small sample, are indicative of a justice unwilling to inflict penalties unless the law was precisely stated and its breach clearly established.

There is only one reported case on the question of the circuit court's jurisdiction and the commerce clause of the Constitution. *Livingston v. Van Ingen*

⁵⁷ *United States v. The James Wells*, 26 F. Cas. 585 (Conn. September 1808).

⁵⁸ *The Active*, 1 F. Cas. 69 (Conn. April 1809).

⁵⁹ *The Elizabeth*, 8 F. Cas. 468 (New York, April, 1810).

(1811)⁶⁰ was noteworthy because it involved a dispute over the exclusive right to navigate passenger steamboats on the Hudson River granted by United States patent. It was a case which had constitutional and commercial implications and in which, eventually, free enterprise won the day. The complainants, wishing to preserve a monopoly, sought from Livingston an injunction preventing the defendants from using their steamboat and from constructing another. Livingston disposed of the case on the basis that the circuit court had no jurisdiction to try the case, failing to recuse himself despite that the fact that the person who held the monopoly was his brother.⁶¹ Eventually the dispute came before the Supreme Court after Justice Livingston's death entitled, *Gibbons v. Ogden* (1824) when Chief Justice Marshall, for the Court, held that the steamboat monopoly granted to Ogden was unconstitutional, basing the decision on the commerce clause of the Constitution which vested in Congress the exclusive power to regulate commerce among the states. Commerce embraced navigation on lakes, rivers and oceans and, therefore, included steamboat traffic. Marshall did not seek to exclude all state control of commerce, acknowledging that a state had the exclusive right to regulate all commerce which occurred entirely within her borders and did not affect other states.⁶² The decision was a blow to those who sought to monopolize commercial transport and an encouragement to those supporters of open competition.

Maritime and Commercial Law for the United States

The opinions Livingston delivered on circuit and for the Supreme Court made him the leading exponent of commercial law before Joseph Story's arrival on the

⁶⁰ *Livingston v. Van Ingen*, 15 F. Cas. 697 (New York. April 1811)

⁶¹ G. Edward White, *The Marshall Court and Cultural Change*, 569.

⁶² *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

scene in 1811. After Story's appointment the reported cases reveal that both justices were heavily involved in formulating business law and procedure to promote economic prosperity. Livingston's Second Circuit cases show a preponderance of maritime cases followed closely by opinions resolving commercial disputes; a continuation of the type of case he had faced regularly in the state court. The reported commercial cases range from the time for completion of a contract to the persons entitled to sue upon a contract. In *Smith v. Barker* (1809) he held that a contract to build a ship within about a month was not fulfilled by completing it in six months so as to authorize the enforcement of a note made payable upon fulfilment of the contract.⁶³ Livingston refused to permit the United States to sue upon a contract to which it was not a party even though it had an interest in the property which was the subject matter of the action. He observed that the United States, in a contract case, had no privilege or rights beyond those of the individual citizen.⁶⁴

The bulk of Livingstone's commercial work centred on the liability of the parties in respect of bills of exchange, the lifeblood of commerce during this period. They enabled the drawer of the bill to order the drawee to pay money to a third party (the payee) and when the drawee was willing to undertake the payment he was said to have accepted the bill. The usefulness of the bill was in its negotiability as the third party was permitted to endorse it to a fourth party, who could further endorse. The last endorsee was the holder in due course who was in a very favourable position with a right of action on the bill against the original drawer and intermediate endorsers regardless of any disputes arising between those others. Bills were a useful means of payment for long distance trade, particularly between merchants and brokers in the United States and Great Britain and because of their negotiability they

⁶³ *Smith v. Barker*, 22 F. Cas. 454 (Conn. April 1809).

⁶⁴ *United States v. Parmele*, 27 F. Cas. 415 (Conn. April 1810).

were often sold to pay debts. Often disputes on these bills became difficult to resolve because of the number of parties involved.

It was crucial that merchants who took a bill or note in good faith should be protected if commerce was to prosper. Livingston laid down clear rules of law and procedure which enabled businessmen to know how the federal court would deal with disputed contracts. In *Codwise et al. v. Gleason et al.* (1808) when safeguarding the position of an indorsee, he wrote ‘Gleason & Cowles gave the weight of their names to the world and must be responsible to every man who trusts the note relying on their credit.’⁶⁵ Thus, Livingston was emphasizing the obligations of indorsees of notes. In *Cobb’s v. Haydock* (1810) he also protected the indorsee of a note who had obtained judgment against one of two joint makers of a promissory note. He refused to allow a set off against the judgment debt of a sum owed to him personally by the drawee, of which the indorsee had had no notice. Livingston gave indorsees further comfort in *Childs v. Corp* (1810) a case in which the defendant sold a bill of exchange, taking the plaintiff’s note in payment and retaining the bill as collateral security. The bill of exchange was subsequently protested i.e. there was a refusal to pay it and the drawers became bankrupt. The defendant refused to return the bill to the plaintiff and took no steps to pursue any dividends in the bankruptcy. Livingston held that the defendant was liable to make good the plaintiff’s loss.⁶⁶

Livingston’s view that bills and notes, as binding contracts, were so essential to commercial life that in *United States v. Barker* (1816) he refused to declare illegal a bill drawn by a citizen of the United States on a citizen of Great Britain whilst the two countries were at war. Furthermore he held that a delay of three months in presenting for acceptance the bill drawn in New York on Liverpool was not

⁶⁵ *Codwise et al. v. Gleason et al.* 5 F. Cas.1167 (Conn. April 1808).

⁶⁶ *Childs v. Corp*, 5 Cas. 622 (Vermont, October 1810).

excessive in view of the state of war. He observed that during the Revolutionary War, ‘scarcely a ship sailed from the United States ...for any port of Europe that was not almost loaded with bills of exchange on British houses.’⁶⁷ These reported opinions reveal, in Livingston’s holdings on bills and notes, a determination to inspire confidence in the business world that the court would ensure that bills and notes would be honoured.

Again, acknowledging the paucity of circuit court opinions, the forty-nine cases examined reveal, as one would expect, in busy commercial centres, a variety of cases but with a preponderance of commercial disputes and maritime cases which would enable Justice Livingston to approach confidently if invited to write for the Court on those issues. Chief Justice Marshall was well aware of Livingston’s particular expertise because, of the 36 majority opinions he wrote for the Court, he was chosen to author twenty one maritime and fourteen commercial law cases which shows, as far as this associate justice is concerned, that experience in particular branches of law was a very important factor in the Chief Justice’s opinion assignment practice. The very first opinion he wrote for the Court was appropriately to affirm the forfeiture of the cargo of a vessel which had had imported goods from Cuba to Maryland in breach of a licence confining her to United States coastal waters.⁶⁸

Livingston wrote ten reported opinions for the Court relating to forfeiture or detention of vessels for breaches of embargo and, in a shift away from the pattern established in his circuit court opinions, he affirmed each and every forfeiture or penalty imposed by the court below. He made it plain in strong terms that he rejected

⁶⁷ *United States v. Barker*, 24 F. Cas. 987 (September 1816).

⁶⁸ *Keene v. United States*, 9 U.S. (5 Cranch) 304 (1809). Livingston held that the appropriate venue for a trial was the court of the district in which the goods were seized regardless of the district where the forfeiture accrued.

the excuses advanced for the various breaches. Many of these cases offered very similar questionable explanations. In *The Brig Struggle* (1815), Livingston rejected the master's excuse that he was prevented from reaching Charleston because of storms, and was obliged to sail to the West Indies in order to save lives. He commented on the many cases of 'fictitious distress' offered to the courts for violations of the embargo and observed that the Court would look 'with considerable jealousy and caution on evidence which is so perpetually recurring.' He went as far as to hold that those who raise the defence of Act of God must establish it as to leave no reasonable doubt, thereby reversing the burden of proof in respect of an alleged breach of a penal statute.⁶⁹

Livingston's critical approach to such claims was justified. There was a flood of embargo breach cases coming before circuit courts and the Supreme Court. Ship owners and masters were becoming desperate and willing to risk losing vessels and cargoes. As Wood rightly observes of New England, 'ships were lying idle in the harbors and that thousands of sailors, dock workers, and others employed in mercantile activities were out of work.'⁷⁰ In fact, the embargo was doing far more economic damage to the United States than it was to any European power.

The *vis major* embargo defences were not rejected on the ground of public policy. Each case was investigated fully before such a severe penalty was affirmed. The defence had to have been shown to be spurious. Livingston's opinion in *The New York* (1818) demonstrated an extensive knowledge of maritime practices when examining the master's explanation and highlighting the deficiencies in his story and which caused him to conclude that 'he has made out as weak a case of necessity as

⁶⁹ *The Brig Struggle*, 13 U.S. (9 Cranch) 71 (1815)

⁷⁰ Gordon S. Wood. *Empire of Liberty: A History of the Early Republic* (New York: Oxford University Press, 2009), 655.

was ever offered to a court in the many instances of this kind which occurred during the existence of this restrictive system.⁷¹

Public policy considerations did apply in *Otis v. Watkins* (1815) in which Livingston, for the majority, held that a port collector who detained a vessel under the Embargo Act 1808, pending instructions from the President, need not show that his opinion was correct, nor that he used reasonable care and diligence in ascertaining the facts. It was sufficient if he honestly entertained his opinion and did not act out of malice. Livingston said, in effect, that if it were otherwise, no public official would act for fear of the consequences, Chief Justice Marshall, in one of his rare dissents, argued that despite the absence of a requirement in the statute to take reasonable care in the collection of the information for transmission to the President, there should be such a duty on the collector.⁷² This would seem to be the preferable approach to the issue as it is difficult to understand how the collector could hold an honest opinion if he took no care in collecting and transmitting the evidence.

Public policy featured again, this time in contract law in *Lee v. Munroe & Thornton* (1813) when Livingston, for the Court, held that the United States was not bound by the declarations of its agent founded on a mistake of fact unless the declaration was within the scope of his authority and he was empowered to make it. Livingston put it bluntly when he declared that it was better that an individual should occasionally suffer than the United States should lose liens on valuable and large tracts of land.⁷³

⁷¹ *The New York*, 16 U.S. (3 Wheat.) 59 (1818). For further examples of Livingston's hard line approach to breaches of the embargo legislation and illegal captures see, *The Aeolus*, 16 U.S. 392 (1818); *The Rugen: Buhring, Claimant*, 14 U.S. 62 (1816); *The Estrella*, 17 U.S. (4 Wheat.) 298 (1819); *The Santa Maria*, 20 U.S. (7 Wheat.) 490 (1822).

⁷² *Otis v. Watkins*, 13 U.S. (9 Cranch) 339 (1815).

⁷³ *Lee v. Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813)

Livingston again supported the United States in *Dugan v. The United States* (1818) when he rejected the argument that the United States should not be permitted to sue in its own name and the action should be in the name of the agent who conducted the business on behalf of the government department. He questioned why the United States should be denied a right which was secured to every citizen.⁷⁴ However, he preferred other creditors' claims to those of the United States in *United States v. Bryan & Woodcock* (1815). The United States had attempted to achieve priority of payment out of a bankrupt's estate who had been surety for a customs collector. Livingston held that debt was incurred before the act of Congress bestowing priority came into force even though the accounts were not settled until after the act's passage.⁷⁵ An even handed approach was demonstrated in *United States v. Giles* (1815) when Livingston rejected the claim of the United States on a bond against the surety of a marshal who had collected monies under an execution on goods and had failed to account to the Comptroller of the Treasury. The marshal had collected the monies before the surety had executed the bond even though the money was still in the marshal's hands.

Livingston wrote only one slavery opinion for the Court when he rejected a defence of entering port as a necessity in *The Joseph Segunda* (1820) and forfeited the vessel because it had been used for the purpose of selling slaves and had entered the Mississippi in breach of an act of Congress prohibiting the importation of slaves into the United States after January 1, 1808. He made his feelings clear on the issue when affirming the forfeiture order, referring to 'this inhuman traffic' and 'this

⁷⁴ *Dugan v. United States*, 16 U.S. 172 (1818).

⁷⁵ *United States v. Bryan & Woodcock*, 13 U.S. (9 Cranch) 374 (1815).

unrighteous commerce,' observing that at that time slaves were being sold at New Orleans for \$1,000 each.⁷⁶

The maritime case of *Hudson & Smith v. Guestier* (1810) is noteworthy not for the point of law decided but for the fact that the Chief Justice, after Livingston had handed down the opinion of the Court, referred to the Court's earlier opinion in the same case in his dissent. He observed that 'he supposed [it] had been concurred in by four judges, But in this he was mistaken. The opinion was concurred in by one judge.'⁷⁷ A rather fundamental mistake which makes one question how formal the justices' deliberations were at the conclusion of evidence and arguments. One would have expected the Chief Justice as chairman of the post case discussions to note carefully those justices who concurred in the opinion to be delivered.

The bulk of Livingston's opinions for the Supreme Court in commercial matters related to negotiable instrument disputes in which, in order to assure those taking bills of exchange and promissory notes, he generally favoured the creditor. Such an approach recognized the negotiable instrument as the cornerstone of trade payments and made merchants confident that the Court would ensure that solemn obligations were enforced. Thus in *Riggs v. Lindsay* (1813) where the defendants ordered the plaintiff to purchase salt for them and to draw on them for the amount he expended, Livingston held that they were bound to accept and pay his bills.⁷⁸ However, he did hold in *Young v. Grundy*, in the same year, that where a payee failed to perform his part of the contract upon which the promissory note was given and a new agreement was reached between the parties in substitution for the old, the original failure could not be investigated. Any subsequent indorsee of the note could

⁷⁶ *The Joseph Segunda*, 18 U.S. (5 Wheat.) 338 (1820).

⁷⁷ *Hudson & Smith v. Guestier*, 10 U.S. (6 Cranch) 281 (1810).

⁷⁸ *Riggs v. Lindsay*, 11 U.S. (7 Cranch) 500 (1813).

not be affected by any dispute between the original parties.⁷⁹ Where the bill or note had passed through a number of hands Livingston ensured that there was no collusion between the parties to an action. Thus, in *Marshall v. Beverley*, he refused to grant an injunction on judgments already obtain until all the parties involved had filed answers setting out their cases. He was not satisfied by the agreed assertions of just two parties.⁸⁰

Whilst we do not know how co-operative Livingston was in conferences, the number of dissents he wrote indicate that he was not the expected Republican thorn in the side of a Federalist Chief Justice. He was willing to hide his personal views from public view to enable the Court to speak with one voice as he did in *Sturges v. Crowninshield* (ante). His letters to Justice Story thanking him for and praising him for his draft opinion in *Trustees of Dartmouth College v. Woodward* (1817) indicates a spirit of co-operation borne not just from friendship but also of shared fundamental values.⁸¹ Although ostensibly members of different political parties, the Supreme Court justices came from the same affluent background and had the desire to see the economy flourish and property rights protected. Therefore, they had a mutual interest in furthering trade and preserving existing rights to real and personal property, whatever the political label attached to them on appointment.

Conclusion

Justice Livingston's circuit opinions and his majority opinions for the Court support the view that expertise gained on circuit was a crucial factor in the development of federal law on the Supreme Court and also key to the Court's

⁷⁹ *Young v. Grundy*, 11 U.S. (7 Cranch) 548 (1813).

⁸⁰ *Marshall v. Beverly*, 18 U.S. (5 Wheat.) 313 (1820).

⁸¹ Letter, Livingston to Story, 27 January, 1819. , Dunne, 'Story-Livingston Correspondence,' 231-232.

opinion assignment practice. Livingston differs from Washington in that, although he adhered to the doctrine of precedent, the English authorities, for personal reasons discussed earlier in this chapter, did not hold the same magic for him. His remark in *Penny v. New York Insurance Company* that he followed the English rule as it was a reasonable approach and not because he regarded it as an authority and his pointed comment in *Leroy v. Lewis* that he preferred a state court decision to a British authority suggests that, wherever possible, he would look first to federal and local laws.

Constitutional matters rarely featured at circuit level. Livingston presided over two such cases which are notable not just for the important issues in dispute but also for revealing the tensions facing a justice appointed by a Republican president, torn between state sympathies and a professional role that supported federal power. Livingston's acknowledgment of the supremacy of federal law over New York legislation in *Fisher v. Harnden* and his holding the contrary, in *Adams v. Story*, that a New York insolvency law did not impair the obligation of contract clause of the Constitution reveal a willingness to decide each case on its merits without a pre-conceived partisan approach.

The opinions examined here establish Livingston's specialties on circuit, and before that on the New York Supreme Court, as maritime and commercial law. Of a total forty-eight surviving circuit court opinions, fourteen covered maritime disputes and ten resolved commercial issues. On the Supreme Court he authored thirty-six majority opinions of which twenty one were maritime disputes and fourteen were commercial cases. There were a total of 1426 legal categories in the Supreme Court opinions delivered between 1801 and 1835. Only 149 related to admiralty and 263 to commercial law: this refutes any suggestion that those cases constituted the bulk of

Supreme Court work and that is why Livingston authored such a high proportion of admiralty and commercial opinions. Virtually all of the opinions Livingston authored for the Court were on branches of law in which he had acquired special circuit expertise. Of the many legal points in the remaining categories, Livingston was never invited to write opinions on crime, constitutional law, international law, real property, public lands, or patents.⁸² This is because he had not demonstrated any special circuit expertise in those branches of the law. He was invited to write only on those cases involving disciplines with which he was completely familiar and John Marshall knew the value of circuit expertise; where it lay; and how best to use it on the Court. He would have appreciated that by giving maritime and commercial cases to Livingston, other justices would respect the opinions he wrote and waverers might be persuaded to the majority view.

Although as a state justice and a Supreme Court justice sitting on the Court and on circuit, Livingston had to deal with a wide spectrum of legal issues, those opinions he delivered in all three jurisdictions mark him as a leading authority on commercial law. His opinions began the process of ensuring that men of commerce understood their general contractual obligations and specifically their responsibilities in relation to negotiable instruments, even in respect of bills drawn on a citizen of Britain during wartime. (*Codwise et al. v. Gleason et al*; *Childs v. Corp*; *United States v. Barker*). His state court opinions in *Watson v. Delafield*; *Green v. Beals*; *Casey v. Brush* clarified the rights and obligations of members of a partnerships which he believed integral to the development of trade and industry. His overall object was to provide a legal and procedural framework regulating the conduct of commerce and promoting trade at home and abroad. Story, himself no mean

⁸² These figures are taken from Johnson, *The Chief Justiceship of John Marshall*, 117. Table 2, Number of Legal Categories in Opinions by Justices, 1801-1835.

commercial lawyer, wrote, in the eulogy he delivered in 1823 upon Livingston's death, that the justice's 'genius and taste had directed his principal attention to the maritime and commercial law; and his extensive experience gave to his judgments in that branch of jurisprudence a particular value which was enhanced by the gravity and beauty of his judicial elegance.'⁸³

Unlike Thompson, Livingston was eager to protect from personal liability public officials acting in good faith in the performance of their duties. However, when jurors performed their public function, Livingston was quick to reverse verdicts with which he disagreed. In *Smith v. Cheetham* he wondered why judges regarded jury verdicts as sacrosanct. He did not regard them so and was very willing to investigate alleged irregularities and set aside verdicts which were against the weight of the evidence as he did in *Mellish v. Arnold* and *Brandt v. Ogden*. However, his willingness to overturn jury verdicts and order new trials contradicts his sentiments in *United States v. James Wells* where he described the burden faced by judges trying alleged breaches of penal statutes without a jury which might result in the forfeiture of a vessel and her cargo. He appears to want the protection of a jury when serious consequences flow from an adverse finding but not in the run of the mill case.

In the busy port of New York, Livingston presided over many allegations of breaches of embargo laws, sailing licences, and revenue laws. Like Story, he was generally unsympathetic to the dubious excuses advanced by ship-owners and masters for route deviations, failures to report on entering harbour, or avoiding the correct import duty. (*United States v. Five Packages of Linen; Ninety-Five Bales of Paper v. United States; United States v. James Wells; The Active; The Elizabeth*).

⁸³ Preface to the *United States Reports* (8 Wheat.) 1823.

However, his reversal of seven forfeiture orders of the district judge show him to be a justice who was more accepting of defence explanations than Story.

Ultimately, Livingston's most significant contribution, and his legacy to United States law was through his commercial and maritime opinions. His writings for the Court on negotiable instruments in cases such as *Riggs v. Lindsay*; *Young v. Grundy*; *Lennox v. Prout*; and *Marshall v. Beverley* consolidated business law. His clear formulation of contractual rights and obligations gave the business community the confidence to trade and accept bills of exchange and promissory notes knowing that the federal courts would deal promptly and consistently with any breaches.

Chapter Four

Joseph Story: Admiralty Expertise and the Importation of Common Law

This chapter establishes Justice Story's influence on the development of United States law during his twenty four year tenure of the Marshall Supreme Court by focussing on the reports of cases he tried as presiding judge of the United States First Circuit Court for Massachusetts, Maine, New Hampshire, and Rhode Island. His circuit opinions reveal his role as a justice who, whilst a master of most branches of law, was the Marshall Court's leading exponent of admiralty law. The chapter also investigates his efforts to make United States law more readily accessible and easily understood by importing common law principles into admiralty, criminal, and commercial law and, by a codification of federal criminal law. The opinions show that he brought to the judicial function a more professional approach based on a meticulous approach to research, attention to detail, and streamlining of procedure by discouraging prolix speeches and written pleadings; all of which led to a more efficient dispatch of business. His prolific correspondence is valuable because it aids an understanding of his thoughts on how a uniform system of federal law and procedure can be achieved.

Joseph Story was born on September 18th 1779 at Marblehead, Massachusetts into a very large and deeply religious middle class family of English stock. His father was a physician who had participated in the Boston Tea Party and served as a surgeon during the Revolutionary War.¹ Story was graduated from Harvard College

¹ This brief introductory biography paragraphs is distilled from a number of sources; Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon & Schuster, 1970); and R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985. William W. Story's *The Life and Letters of Joseph Story*, 2 Vols. (London: John Chapman, 1851) is the typical adulatory biography by a son of his father but is a valuable repository of original material. The extent to which Story's deeply held religious are examined by Jay Alan Sekulow in, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and*

in 1798 and, there being no Law School at the college until 1817, he read law in the offices of two Marblehead lawyers where his basic training consisted of mastering the four volumes of Blackstone's *Commentaries on the Laws of England*.² He bemoaned the absence of American reports which meant that a student was unable to apply the learning of the common law to his own country or distinguish what had been adopted in the United States.³ Story's grounding in *Blackstone* and, therefore, in English common law and the decisions of the justices of the Queen's Bench and Chancery Courts constituted the basis of his judicial philosophy, adapted to solve the particular problems facing the Early Republic.

He was admitted to the Essex Bar in July 1801 and set up office as a sole practitioner in the port of Salem at a time when virtually all the offices of importance in the Commonwealth of Massachusetts were occupied by Federalists.⁴ This presented a real problem for Story who had inherited the Democratic Republican political outlook of his father. Thomas Jefferson had been sworn in as President in March 1801 after a bitter contest with President John Adams and those lawyers, including Story who made no secret of their Republican ideals were ostracized, Story, wrote in his *Autobiography* 'For some time I felt the coldness and estrangement' ... being left 'solitary at the bar.'⁵ His Federalist colleagues were

Their Opinions (Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 2006), 21-32, which also contains useful information on his early education.

² Arthur E. Sutherland, *The Law at Harvard: A History of Men and Ideas, 1817-1967* (Cambridge, Mass: Harvard University Press, 1967), 59. This was the common method of training lawyers in the early 19th century. University training in law was extremely rare. 'Law was learned mostly by clerking as an apprentice in a lawyer's office. The apprentice read text books and case reports and entered notes on his reading in an alphabetised notebook called a 'commonplace book.' John H. Langbein, 'Blackstone, Litchfield, and Yale,' in Anthony T. Kronman, *History of Yale Law School: The Tercentennial Lectures* (New Haven: Yale University Press, 2004), 19. For a comprehensive account of legal training during this period, see, Steve Sheppard (ed.), *The History of Legal Education in the United States: Commentaries and Primary Sources*, Vol.1. (Pasadena: Salem Press, Third Printing in 2010 by Lawbook Exchange of the 1999 ed.).

³ William W. Story, vol. 1, 70-74.

⁴ *Ibid.* 95-96.

⁵ *Ibid.* 97.

clearly finding the idea of a Republican government difficult to accept. Despite the political climate, Story, within two years, had built a thriving practice. In 1804 he began writing the first of many legal tomes with the publication of his well-received, *Selection of Pleadings in Civil Actions*.⁶ Within five years of his admission as counsel he was opposing the leaders of the Bars of New England and had begun the mammoth task of digesting all the reported state and Supreme Court opinions on Insurance, Admiralty and Prize law.⁷

He was elected to the Massachusetts legislature in 1805. Although a Republican and supporter of the policies of President Jefferson, Story was an unusual member of that party because of his admiration for President Washington's vision of a strong national government instead of a loose confederation of states. Thus, he was that rare animal, a politician of independent mind who, whatever the official party line, voted according to his view of the merits of the issues, remarking that a 'Virginian Republican...was very different from a Massachusetts Republican' and that Virginia's anti-federalist policy met with little support in his home state.⁸ It is difficult to see how Story could possibly support resolutions which purported to grant to the states the power and duty to declare unconstitutional Acts of Congress which they believed were not authorised by the Constitution.⁹

Story displayed a freedom to disregard Republican policy by the unpopular but crucial role he played in 1806 to establish the salaries of the Federalist judges of the Supreme Judicial Court in Massachusetts on a permanent basis and by his eventual opposition to President Jefferson's embargo policy.¹⁰ The Embargo Act of

⁶ Ibid. 112.

⁷ Ibid. 119-124.

⁸ Ibid. 128.

⁹ Kentucky Resolutions 1798 and 1799; Virginia Resolution 1798.

¹⁰ W.W. Story, 130-135.

1807 and the subsequent Non-Intercourse Acts, brought about by the seizure of American ships and impressment of seamen by the Royal Navy, restricted American ships from engaging in foreign trade during the Napoleonic Wars. The legislation's objectives were to cause economic hardship to the belligerents. It had little or no effect on England but caused considerable hardship to the United States, particularly in New England. Story originally supported the Act's objectives on the basis that it was preferable to war.¹¹ However, the disastrous effect of the embargo forced him to reconsider his support and having taken his seat in Congress, he argued for the repeal of the Act, thereby incurring the displeasure of former President Jefferson and the Republican Party.¹² The embargo, he declared 'prostrated the whole commerce of America and produced a degree of distress in the New England States greater than that which followed the (Revolutionary) War.'¹³ He described the legislation as a 'miserable and mischievous failure' and 'almost a crime.'¹⁴

Story's opposition to the Act caused former President Jefferson to attempt persuade to President Madison not to nominate Story to the United States Supreme Court describing him as 'a pseudo-Republican' who had deserted the republicans on the embargo measure, and was 'unquestionably a tory...and too young.'¹⁵ Story's defence of the Massachusetts judiciary and his stance against the embargo in the face of his party's hostility showed him to be a man whose political independence

¹¹ Ibid. 136-139.

¹² Ibid. 171-172.

¹³ Ibid. 183-184.

¹⁴ Ibid. 185.

¹⁵ Letter Thomas Jefferson to James Madison, October 15th, 1810, in James Morton Smith, *Republic of Letters: The Correspondence between Thomas Jefferson and James Madison*, 3 Vols. (New York: W.W. Norton and Company, 1995), Vol. 3. 1646. The 'pseudo-Republican' epithet was contained in a letter President Jefferson wrote to General Dearborn on 16 July 1810 contained in Story, *Life and Letters*, vol.1. 186. In his reply to Jefferson on October 19, 1810, Madison merely said that Story's name had not yet been brought forward. There was a difficulty in filling the vacancy as other candidates had refused the nomination and he had to nominate a New Englander. (Ibid. 1648)

was an obstacle likely to his attaining high political office but which suited him to the judicial role.

Throughout his career there is a tension between his membership of a party which advocated the right of states to govern themselves and his overriding belief in the need for strong national government. His belief in an independent judiciary to monitor the activities of the other departments of the national government, state courts and legislatures was a view which flew in the face of Republican policy. Justices William Johnson, Livingston, Todd, Duvall and Smith Thompson also grappled with the dilemma, having been nominated to the Supreme Court by Republican Presidents whom they disappointed by acquiescing in the establishment of federal laws binding on every state of the Union.

Story added to his extensive political and law practice commitments with the publication of three major, well received law books: he edited and heavily annotated *Chitty on Bills of Exchange and Promissory Notes* (1809); *Abbott on Shipping* (1810) with extensive notes and references to American decisions and statutes; and in 1811 he produced a heavily annotated edition of *Laws on Assumpsit*.¹⁶ This in depth research gave him an understanding of how law had developed and been applied in other jurisdictions, enabling him to extract those principles of law best suited to the United States.

Story's general reputation took him to the shortlist of New Englanders to replace Justice Cushing on the Court and to preside over the United States First Circuit. He was not the automatic choice as three other prominent lawyers were approached and declined the nomination but was offered the appointment as the

¹⁶ Story, *Life and Letters*, vol. 1. 204.

most prominent New Englander willing to take it. As a New England Republican, he did not exhibit the fervour of those Virginia Republicans such as Thomas Jefferson who resented the federal government's encroachment upon state sovereignty and believed the Federalist dominated Supreme Court to be an agency of national government control. On the 18 November 1811 the Senate confirmed President Madison's nomination and Story joined the Court upon which he served for thirty-three years until his death on circuit in 1845.

His enthusiasm and reputation was such that in his first session of the Court, he delivered the Court's opinion in two cases and during his twenty-four years on the Marshall Court he delivered 195 majority opinions. It is perhaps unfair to contrast Story's contribution with that of Justice Duvall, a most inactive justice, joining the Court on the same day but delivering only sixteen opinions in the same period. Story's workload should be set against that of the next most prolific opinion writer Justice William Johnson, handing down 108 opinions between 1804 and 1834.

Primary material to supplement William W. Story's *Life and Letters* and the *Federal Cases* includes Gerald T. Dunne's 1970 biography of Story, prompted by Justice Frankfurter and R. Kent Newmyer's 1985 account of his life and contribution to the Court, both biographies focussing on the justice's Supreme Court work.¹⁷ There is a useful pen sketch of Story by G. Edward White (1988) who describes him as 'unquestionably the busiest and most productive judge of Marshall's tenure...and

¹⁷ Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon & Schuster, 1970).

R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985). See also Newmyer's, 'Justice Joseph Story on Circuit and a Neglected Phase in American Legal History, *The American Journal of Legal History*, vol. 14, No. 2 (1970), 112-135.

quite possibly the most the most active in the entire history of the Court.’¹⁸ White outlines Story’s contribution to the Court in his 2012 *Law in American History*, but merely repeats Dunne & Newmyer and his own *The Marshall Court and Cultural Change, 1815-1835* (1988), confining himself to Story’s major opinions for the Court.¹⁹

A more recent analytical scholarship on Story is that of Finkleman (1994) who looks with a critical eye on just one of Story’s opinions, the Fugitive Slave Act case of *Prigg v. Pennsylvania* (1842), discussed later in this chapter in an overview of Story’s slavery opinions.²⁰ Baker (2014) has contributed the most recent insight into Story’s opinion in *Prigg*.²¹ Collections of Story’s letters to Justice Livingston and to John Marshall are also available.²² Apart from Newmyer’s essay on Story on circuit, the main emphasis of scholars has been on Story’s Supreme Court opinions and academic achievements. This thesis offers an in depth analysis of his circuit opinions to understand his local experiences and how they shaped his judicial philosophy.

A Modernizing Influence on Law and Procedure on the First Circuit

Scholars naturally focus on Story’s Supreme Court opinions because their impact was generally much more widely felt than his circuit opinions. However, it is essential to examine those local decisions to see how he established a body of circuit

¹⁸ G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (New York: Cambridge University Press, 2010), 355. (First published in 1988, Macmillan Publishing Company). White contributes a very valuable account of Story’s mastery of prize, admiralty and marine insurance law. (904-922).

¹⁹ G. Edward White, *Law in American History*, vol. 1 (New York: Oxford University Press, 2012).

²⁰ Paul Finkleman, ‘Story Telling on the Supreme Court: *Prigg v. Pennsylvania* and Justice Joseph Story’s Judicial Nationalism,’ *The Supreme Court Review* (1994), 247-294.

²¹ H. Robert Baker, ‘A Better Story in *Prigg v. Pennsylvania*’ *Journal of Supreme Court History*, 2014. Vol. 39, No. 2, 169-189.

²² Gerald T. Dunne, ‘The Story Livingston Correspondence (1812-1822),’ *American Journal of Legal History*, vol. 10, No. 3 (1966), 224-236. Charles Warren, ‘The Story-Marshall Correspondence (1819-1831),’ *William and Mary Quarterly*, Second Series, vol. 21, No. 1 (1941). 1-26. See also Howell J. Heaney, ‘The Letters of Joseph Story (1779-1845) in the Hampton L. Carson Collection of the Free Library of Philadelphia,’ *The American Journal of Legal History*, vol. 2. No. 1 (1958), 68-86.

law and procedure to resolve what he believed to be the most important and satisfying function he exercised as a justice. In 1840 he wrote, 'If my fame shall happen to go down to posterity, my character as a judge will be more fully & accurately seen in the opinions of the circuit court than in the Supreme Court.'²³ He was more able to express his views freely in circuit court without the need to accommodate the opinions of his brethren on the Court as evidenced by Story's complaint that he had withdrawn a dissent because Justice Washington thought that 'dissenting opinions on ordinary occasions weakens the authority of the Court, and is of no public benefit.'²⁴

Story sat on circuit in the main centres of Boston, Massachusetts; Portland, Maine; Portsmouth, New Hampshire; and Providence, Rhode Island. He rode circuit each May and October and, depending on the amount of work awaiting him, each circuit might take two months to complete; he would travel each year approximately 4,000 miles along poor roads often in very trying conditions. He also sat on the Court in Washington which could take up to a further two months of his time, so that in all he sat for about half of the year.

The search for patterns of jurisprudence in Story's circuit cases has involved an examination of the 458 of his opinions, between 1811 and 1835, surviving to the *Federal Cases*. Although Story covered all branches of law on circuit, he spent by far the greater part of his time on admiralty matters upon which he became the acknowledged expert of his age. 169 of his opinions flow from prize cases, general admiralty disputes and marine insurance cases, 101 of which arose between 1812

²³ Letter. Story to District Judge Joseph Hopkinson, February 16, 1840, cited from the Hopkinson papers by R. Kent Newmyer in *Joseph Story*, 318.

²⁴ Letter, Justice Story to Court reporter Henry Wheaton, April 8th, 1818. W.W. Story. *Life and Letters*, Vol. 1. 303-304.

and 1813 due to attempts by ship-owners and masters to evade embargo and non-intercourse acts. According to his son, Story's docket was overloaded with such cases when he first came on circuit due to the inability of his predecessor, Justice Cushing, to attend to business because of illness. Story dealt with the backlog firmly by removing 130 cases from the docket with one opinion. He held that no appeal lay from the District Court to the Circuit Court except in civil maritime and admiralty cases and that any jury verdict in the District Court could come up to the circuit court only upon a point of law or a writ of error. There was no entitlement to a second jury trial.²⁵ This no-nonsense attitude was typical of his approach to circuit work, streamlining practice and procedure for the efficient dispatch of business. Local lawyers and business men accepted this peremptory clearance of the docket because it was never appealed.

Story was unhappy with the long accepted tradition of excessively lengthy pleadings and legal argument because it stood in the way of a reasonably manageable docket. After his first Supreme Court sitting in February 1812, Story complained to a friend of lists crowded with overloaded documents and a brief of 230 pages with legal argument lasting five days.²⁶ His determination to simplify the court process was illustrated by his circuit opinion in *Harding et al. v. Wheaton et al.* (1821) when he complained of the length and prolixity of the pleadings which could easily have been reduced by half and threatened in future to send such cases to the master before trial to be corrected at the expense of the parties.²⁷ His desire to bring disputes to the earliest possible conclusion was apparent in his handling of the

²⁵ Ibid. 221. The opinion was in *United States v. Wonson*, 28 F. Cas. 745. Mass. May 1812.

²⁶ Letter Joseph Story to Samuel Fay, February 24th, 1812. W.W. Story, *Life and Letters*, vol. 1. 216.

²⁷ *Harding et al. v. Wheaton et al.* 11 F. Cas. 491. Rhode Island, November 1821.

circuit cases of *Hatch v. Ellis* (1812),²⁸ *Green v. Watkins* (1821),²⁹ *Mandeville v. Riggs* (1829),³⁰ and *Gammell v. Skinner* (1814).³¹ These procedural opinions reflect his modernizing influence.

In his very first full circuit sitting Story expressed concern over government legislative language which he found ‘loose and inartificial,’ giving judges little guidance on the intention of Congress or the state legislature.³² His approach to imprecise penal statutes was to refuse to punish defendants by giving effect to doubtful passages.³³ His practice was settled firmly the following term in New Hampshire when in the embargo case of *United States v. Mann* (1812) he declared, ‘I will not be the first judge sitting in this seat to strain a proviso against a citizen.’³⁴ These cases show that from his first sittings, Story’s mastery of law and procedure from his practice at the Bar gave him sufficient confidence to exert firm authority over litigants, sending indirect messages to Congress and state legislatures that he was not prepared to remedy deficiencies in drafting at the expense of citizens. Unless the meaning of a statute was plain it would be construed in favour of a defendant facing a possible penalty such as the loss of a vessel and cargo. It was an approach designed to protect the citizen rather than punishing the draftsman.

²⁸ *Hatch v. Ellis*, 11 F. Cas. 806. Mass. May 1812.

²⁹ *Green v. Watkins*, 19 U.S. (6 Wheat.) 260 (1821).

³⁰ *Mandeville v. Riggs*, 27 U.S. (2 Pet.) 482 (1829).

³¹ *Gammell v. Skinner*, 9 F. Cas. 1142. Mass. May 1814.

³² *The Argo*, 1 F. Cas. 1100. Mass. May 1812. According to the *Federal Cases* reports, Story had actually sat on circuit in Boston during the October 1811 term. There is only one reported case from that term dealing with the liability of a carrier of banknotes (*Citizen’s Bank v. Nantucket Steamboat Co.*, 5 F. Cas. 719. Mass.) October 1811). He must have tried the case in November because his nomination the Court by President Madison was not confirmed by the Senate until November 18, 1811.

³³ *The Falmouth*, 8. F. Cas. 981. Mass. May 1812.

³⁴ *United States v. Mann*, 26 F. Cas. 1153. New Hampshire. October 1812.

Admiralty and the Enforcement of Embargo Laws

During Story's first full term in Boston in May 1812, 21 of the 28 reported opinions he handed down involved allegations of breaches of the Embargo Act and, despite his opposition to embargo as a politician, he treated established contraventions seriously; his opinions reflected his refusal to accept many of the excuses advanced for breaches. Hearing the same unconvincing excuses so often he became rather cynical in his approach.³⁵ He treated an alleged breach as an offence of strict liability, placing the burden of proving that a route deviation was necessary on the master and owners of the vessel.³⁶ This reversal of the burden of proof meant that in *Ten Hogsheads of Rum* (1812) the claimants were unable to prove that the rum was not of British origin and Story made a forfeiture order to the United States.³⁷ This harsh approach was one which reflected his strong nationalism and a stance which during the 1812 War would be fully supported across the political spectrum. In *United States v. Webber* (1813) he recounted his experience of similar cases when as counsel for ship-owners against the United States, he had felt embarrassed that a narrow interpretation of the statute made it easy for commanders to excuse a failure to report arrival at a port by claiming entry by necessity. He hoped that vigorous examination of defences to breaches of the embargo laws would prevent a flood of spurious excuses.³⁸

³⁵ Between 1812 and 1814 privateers commissioned by the president captured an estimated 2000 vessels. 150 such commissions were granted in Massachusetts alone and Story's home town of Salem sent out 43 privateers, which during the war with Britain accounted for 300 prizes of which 130 were condemned by the district and circuit courts. These figures are taken from Capt. Michael H. Rustein, *The Privateering Stroke: Salem Privateers and the War of 1812* (Salem: Create Space Independent Publishing Platform, 2012). See also the Act of January 27, 1813 which set out the procedure for applying for Letters of Marque and the rules under which privateers were to operate. (Richard Peters (ed.), *The Public Statutes at Large of the United States of America*, vol. 2 (Boston: Charles C. Little and James Brown, 1850). 759-764.

³⁶ *The Short Staple*, 22 F. Cas. 23. Mass. May 1812.

³⁷ *Ten Hogsheads of Rum*, 16 F. Cas. 932. Mass. October 1812.

³⁸ *The Boston*, 3. F. Cas. 925. Mass. October 1812.

Story even found a breach and ordered forfeiture in a case in which notice of the embargo had not reached the master of the vessel on the basis that everyone is presumed to know the law.³⁹ He again applied strict liability in *Cross v. United States* (1812), upholding a penalty of double value of the vessel and cargo for breach of embargo even though the owner was unaware of the illegal voyage.⁴⁰ One can understand his harsh approach to those who traded in enemy goods. It was based not only on his duty to enforce the legislation but also from a background of public indignation at those dealing with an enemy which had invaded the United States once more in 1814 and burned many public buildings in Washington, including the White House and Capitol Building.

Story explained what he believed to be his duty as a judge and his approach to enforcement of the embargo laws in his opinion in *The George* (1814). He cited favourably Sir William Scott's view of the judicial function from the English admiralty case of *The Rosalie and Betty*, (2 C. Rob. Adm. 343), that 'a judge should start out with no prejudice against a party and suppose every case to be a true unless fraud is proved, but he should not shut his eyes to what was happening in the world.' Story had in mind the close proximity of the ports of Maine to British territories and the great temptation to engage in illicit trade. He condemned the increasing number of collusive captures between American traders and British officers or American privateers which he described as 'very unwelcome guests to the court,' pointing to the records of the district and circuit courts to show how extensive the prohibited trade was.⁴¹

³⁹ *The Ann*, 1 F. Cas. 926. Mass. 1812.

⁴⁰ *Cross v. United States*, 6 F. Cas. 892. Mass. May 1812.

⁴¹ *The George*, 10 F. Cas. 196. Mass. October 1814.

On two occasions the Supreme Court believed Story had been too quick in rejecting explanations and holding vessels and cargo forfeit to the United States. In *The Short Staple* (1812) the Court reversed him on the ground that whilst the master's explanation raised strong suspicions it was not so incredible as to justify forfeiture. Story believed that the master had hoodwinked the Court because he dissented from the opinion, insisting that a forfeiture order was justified and noting that he had the support of one of his brethren. Story's other embargo reversal came in *The Bothnea* and *The Jahnstoff* (1814) where he had found a breach on the basis of a collusive capture of two vessels by an American privateer.⁴² However, an inference might reasonably be drawn from the Court's use of phrases such as 'spirit of adventure' and 'talent for enterprise' by the crew of the privateer, of a strong political desire to encourage privateers to harry the enemy and illegal traders and reap the rewards of their important trade.⁴³

Story felt vindicated by his hard line approach when, in *Robinson v. Hook* (1826), he read secret papers thrown overboard from a vessel hovering off the coast of Maine many years earlier in order to effect collusive captures of ships leaving ports in the British provinces in Canada laden with British manufactured goods. The 'captured' vessels were to be taken into United States ports to be forfeited to the captors, thereby getting highly desirable goods into the United States. The papers revealed how many Boston merchants had been involved in such widespread breaches of the embargo, The documents had been passed on to the government but it would appear from Story's expressions of surprise in 1826 that the authorities had not, at the time, passed to the justices evidence of this large scale conspiracy. The

⁴² *The Bothnea, The Jhanstoff*, 3 F. Cas. 962. Mass. May 1814.

⁴³ *The Bothnea*, 15 U.S. 169 (1817).

1826 case gave Story an opportunity criticize ‘the lenient administration of prize law during this period’, and ‘especially in lending an indulgent ear to the claims of our own citizens.’ He was reproaching those other judges and the Court for accepting dubious explanations for breaches. His remark that ‘the justice of those sentences of condemnation, which admitted of most controversy, have in an unexpected manner, been confirmed by facts recently brought to light’ was a vindication of his hard-line approach to embargo breaches.⁴⁴

Another aspect of Boston maritime circuit work were the trials of the criminal offences by seamen whilst on board ship which accounted for twenty-two more opinions, ranging from theft to the capital offences of murder and piracy. He protected seamen’s right to wages and medical treatment, holding that any disobedience must have been habitual or one heinous act to lose pay.⁴⁵ In *Harden v. Gordon et al.* (1823) he held that where a seaman had to be taken ashore because of illness, the cost of food, nursing and lodgings were a charge on the ship, and in *The George* (1832) he extended the same protection to the master of a vessel.⁴⁶ His motives were not altogether altruistic as he remarked in *Harden* that the protection of seamen served commerce and the defence of the nation by encouraging seamen to engage in perilous voyages at low wages.⁴⁷

As well as ensuring that the cost of caring for seamen taken ashore due to illness was provided for, Story was vigilant in discouraging masters who put

⁴⁴ *Robinson v. Hook*, 20 F. Cas. 1017. Maine, October 1826.

⁴⁵ See: *Spurr v. Pearson*, 22 F. Cas. 1011. Mass. October 1816; *The Mentor*, 17 F. Cas. 15. Mass. October 1825. If the claim for forfeiture of wages was based on desertion, Story insisted that the desertion had to be entered in the ship’s log on the very day of the desertion for the claim to succeed, and if the desertion had been condoned wages were to be paid thereafter. (*Cloutman v. Tunison*, 5 F. Cas. 1091. Mass. May 1833).

⁴⁶ *The George*, 10 F. Cas. 205. Mass. May 1832.

⁴⁷ *Harden v. Gordon et al.*, 11 F. Cas. 480. Maine. October 1823.

members of the crew ashore in foreign parts just to rid themselves of a difficult seaman. In *Orne v. Townsend* (1827) he sent out a message to masters when he declared that the court ‘would look with a vigilant eye for discharges of seamen in foreign ports without paying to the U.S. consul the three month’s pay in addition to wages accruing in accordance with the Act of 1825.’⁴⁸ He defined a master’s duty towards his crew members in *United States v. Ruggles* (1828) after the captain had forced a seaman into a jail in a foreign port for conduct which could have been dealt with quite easily on board ship. He wrote, ‘It is the duty of the master to watch over them with parental authority...and he has no right to delegate his authority...to gaolers and turnkeys in a foreign country.’⁴⁹ In the *United States v. Freeman* (1827) Story rejected a defence submission that seamen as a class should never be believed even on oath.⁵⁰

His desire to ensure a fully manned merchant fleet went hand in hand with a wish to see that rescuers of stricken ships were reasonably compensated for placing themselves in harm’s way. This is apparent from his favourable citation of a remark of the English admiralty judge Lord Stowell who said that the remuneration in salvage cases was based ‘not merely on the exact quantum of service performed...but to the general interests of navigation and commerce of the country, which are greatly protected by exertions of this kind.’⁵¹ The above cases on wages, medical expenses, security abroad, rights to salvage, and witness credibility show how Story tempered the harsh realities of life at sea by affording sailors protection under the law and at the same time promoting maritime trade.

⁴⁸ *Orne v. Townsend*, 18 F. Cas. 825. Mass. October 1827.

⁴⁹ *United States v. Ruggles*, 27 F. Cas. 912. Rhode Island. November 1828.

⁵⁰ *United States v. Freeman*, 25 F. Cas. 1208. Mass. October 1827.

⁵¹ *The Emulous*, 8 F. Cas. 704. Mass. October 1832.

Story's admiralty expertise extended to marine insurance, salvage law, and the authority of a master to create a lien on a vessel for repairs necessary to complete a voyage. Of Story's 169 admiralty opinions contained in *Federal Cases Reports*, 22 relate to marine insurance disputes. He held policies void for misrepresentations which materially affected the risk. Thus failure to disclose that the cargo was not all American owned was a breach of warranty and sailing on a date other than that agreed was fatal to cover.⁵² Most disputes which materially affected the risk concerned the seaworthiness of the vessel at the time of sailing and deviations from route not due to life or property threatening emergencies.⁵³ The evidential burdens he set out in *Tidmarsh v. Washington Fire & Marine Insurance Co. Inc.* (1827) were useful to lawyers and their clients. He held that the assured must establish seaworthiness and the insurer had the burden of proving a misrepresentation which materially affected the risk in order to avoid the policy.⁵⁴

By far the most significant of Story's marine insurance opinions was that he handed down in *Delovio v. Boit et al* (1815).⁵⁵ Story reversed the district judge's holding that the district court had no jurisdiction to try a marine insurance dispute as it did not fall within the admiralty jurisdiction entrusted to the federal courts by the Constitution. If this decision had stood it would have severely reduced the business and, therefore, the influence of the federal courts. Story had earlier held that his court had jurisdiction over marine insurance cases, and was determined to reinforce that view in *Delovio*.⁵⁶ Writing to the court reporter, Henry Wheaton, in 1815, he

⁵² *Bayard et al. v. Massachusetts Fire & Marine Ins. Co.*, 2 F. Cas. 1065. Mass. October 1826; *Baxter v. New England Insurance Co. Inc.*, 2 F. Cas. 1058. Mass. October 1822.

⁵³ *Glidden v. Manufacturers' Ins. Co.*, 10 F. Cas. 476. Mass. October 1832.

⁵⁴ *Tidmarsh v. Washington Fire & Marine Ins. Co.*, 23 F. Cas. 1197. Mass. October 1827.

⁵⁵ *Delovio v. Boit et al.* 7 F. Cas. 418. Mass. October 1815.

⁵⁶ *The Jerusalem*, 13 F. Cas. 564. Mass. May 1815. The case was decided primarily on competing claims for a lien on a vessel for repairs but it also had a marine insurance aspect.

described the current state of knowledge of admiralty jurisdiction, law and practice as ‘a most shameful ignorance, and it occasions considerable embarrassment in practice.’ He said that he intended to write ‘a very elaborate opinion upon the whole of the admiralty jurisdiction’ reviewing ‘all the common law decisions on this subject...and all original rights before and since the statutes of Richard II.’⁵⁷ The opinion exceeded 70 pages, citing not only common law decisions and statutes but also all jurists ancient and modern. It is an exposition based on scholarship and research, which the reports reveal to be unique during this period even among Supreme Court justices and evidences a modern in depth research based approach to opinion writing. He concluded the opinion by wondering, ‘how far a superior tribunal may deem it fit to entertain the principles,’ hoping that the parties would take the point on jurisdiction to the Supreme Court but they did not. Because a district judge was prohibited from taking part in an appeal from his own decision, the device of a certificate of division was unavailable. The parties did not even return to district judge to conclude the matter. The point jurisdictional issue did not reach the Supreme Court until 1870 in *Insurance Co. v. Dunham*, when Justice Joseph Bradley, for the Court, followed *Delovio*, holding that marine insurance contracts were within the admiralty jurisdiction. He praised Story’s ‘learned and exhaustive opinion,’ declaring that, despite doubts expressed by other judges as to the jurisdiction, the Court was convinced that Story’s view was correct.⁵⁸

A footnote to *Delovio* appears in a letter written by Story to Nathaniel Williams in December 1815 in which he describes the opinion as ‘the most elaborate I have ever composed,’ and having ‘devoted all of my leisure time for more than a

⁵⁷ Letter, Joseph Story to Henry Wheaton, September 5th, 1815 in W.W. Story, Life and Letters, vol. 1. 267.

⁵⁸ *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 77.

month to the subject.’ After expressing regret that the Supreme Court would not be asked to pronounce upon his opinion, he intimated that the merchants and underwriters of Boston were very happy with his holding as the merchants were ‘not fond of juries.’⁵⁹ If the federal courts had jurisdiction the disputes were tried by judge alone as opposed to judge and jury in the state courts. Clearly men of commerce preferred the more measured approach of a Supreme Court justice to the unpredictable verdict of a jury.

Whilst Boston merchants had reservations about juries, Story was a staunch supporter of the institution, refusing to interfere with a verdict because of an innocent separation of the jury after retirement, and refusing to upset an award of damages even though he thought the amount high.⁶⁰ He believed trial by jury in criminal matters to be ‘the most sacred constitutional right of every person accused of a crime.’ However, he was careful to emphasise that the jury’s verdict must be based not only on the facts it found, but also accord with the judge’s directions on law, explaining to the jury that if it decided the law there would be no consistency and in case of error, the defendant would have no redress.⁶¹ He held the grand jury in the same high esteem, remarking in *United States v. Coolidge* (1815) that ‘it was the great inquest between the government and the citizen.’ He expressed the hope that the ‘institution be preserved in its purity and that no citizen be tried, unless he has been regularly accused by the proper tribunal.’⁶²

⁵⁹ Letter Joseph Story to Hon. Nathaniel Williams, December 3rd, 1815, W.W. Story, *Life and Letters*, vol. 1, 269-270.

⁶⁰ *Burrill v. Phillips*, 4 F. Cas. 832. Rhode Island, November 1812 (separation); *Thurston v. Martin*, 23 F. Cas. 1189. Rhode Island, June 1830.

⁶¹ *United States v. Battiste*, 24 F. Cas. 1042. Mass. October 1835.

⁶² *United States v. Coolidge*, 25 F. Cas. 622. Mass. May 1815.

The remaining 289 of Story's reported circuit opinions covered most aspects of jurisprudence. The major categories were commercial disputes, including contracts, negotiable instruments, banking, partnerships and insolvency (72); land (45); criminal law (39); practice, procedure, and evidence (21); wills (16); and patents (14). These opinions were of great importance to the parties but, unlike his admiralty holdings many were not precedents or rules to be applied, or of particular concern, outside the First Circuit.

Although few in number, his opinions on the slave trade and slavery in general were the subject of national interest. Story had always opposed slavery publicly and, although there are only five of his reported circuit opinions prior to 1835, they reflect his views on this troubling issue. In 1815 in *Fales et al. v. Mayberry*, Story held that no action could be maintained between parties engaged in the slave trade, describing it as 'a most odious and horrible traffic contrary to the plainest principles of natural justice.'⁶³ It was a theme he returned to when he ordered the forfeiture of the vessel and imposed terms of imprisonment for two years and fines of \$2,000 on persons involved in the slave trade.⁶⁴ In *The Alexander* (1823) he forfeited a vessel patently employed in the slave trade even though no slaves had been taken on board.⁶⁵

Story denounced what he described as 'that most detestable traffic the slave trade' in a powerful charge to the grand jury at Boston in the October term of 1819.⁶⁶ He did not apologize for a lengthy speech, charting the history of the slave trade and the efforts of men such as William Wilberforce to put an end to it. He let

⁶³ *Fales et al. v. Mayberry*, 8 F. Cas. 970. Rhode Island. November 1815.

⁶⁴ *United States v. Smith*, 27 F. Cas. 1167. Mass. October 1820; *United States v. La Coste*. 26 F. Cas. 826. Mass. October 1820.

⁶⁵ *The Alexander*, 1 F. Cas. 362. Mass. May 1823.

⁶⁶ W.W. Story, *Life and Letters*, vol. 1, 335-348.

the people of Boston know of the horrors involved by explaining how ‘Husbands are stolen from their wives, children from their parents, and bosom friends from each other.’ He described how the slaves were shackled on the ocean journey in accommodation not much larger than a coffin and that about one half perished within two years of first captivity. His observations were based on his examination of debates in the British Parliament and from a study of first-hand accounts of those engaged in the trade or eye witnesses to its operation. That in depth research is further evidence of the professionalism of a new breed of justice. His attacks on the slave trade were not confined to circuit opinions and charges to the grand jury. He made his stand at public meetings. At the only political meeting he attended whilst a judge in Salem in 1819 he spoke in support of a resolution calling on Congress to ban slavery in all of the territories of the United States and against the proposed compromise to permit Missouri to join the Union as a ‘slave state.’⁶⁷

One of Story’s circuit slavery opinions had an international complication. In *The United States v. La Jeune Eugenie* (1822) he affirmed the district judge’s forfeiture of a captured French ship fitted out for the slave trade. Story emphasized his duty as a judge not to bow to executive and foreign pressure but to ‘extinguish a trade abhorrent to the great principles of Christian morality, mercy and humanity.’ However, and despite his positive assertion of judicial independence, he did later accede to a request made by President Madison, through the district attorney, that he permit the French authorities to dispose of the matter on the basis that that their attitude towards the slave trade was that of the United States.⁶⁸

⁶⁷ Ibid. 359-361.

⁶⁸ Ibid. 348-358.

Story's moral and humanitarian attitude towards the slave trade and all other aspects of his work arose from his Unitarian beliefs. He was a deeply religious man, evident from his reference to 'Christian morality, mercy and humanity' in *La Jeune Eugenie*. His religious beliefs impinged upon his judicial duties because he was convinced that a man without religion was unworthy of belief, as lacking conscience. He declared in *Wakefield v. Ross*, (1827) 'Persons who do not believe in the existence of God, or of a future state, or have no religious views are not entitled to be sworn in as witnesses and that a person with no such belief feared no religious sanction if he lied on oath.'⁶⁹ Because all testimony had to be sworn non-believers were not permitted to give evidence, despite the fact that Article II, Section I of the Constitution gave the president the option of taking the oath of office or affirming. As late as 1908, nine states, including seven of the original colonies, still excluded the testimony of 'non-believers'.⁷⁰

When called upon to interpret state legislation Justice Story looked, in the first instance, for guidance to the opinions of the state justices; a practice confirmed when he later delivered the Supreme Court's opinion in *Bell v. Morrison* (1828) in which he preferred the practice in Kentucky of a five year limitation period for actions instead of the generally accepted six years provided by English law, writing that he would follow the local law whose rules of interpretation must be presumed to be founded on a more just and accurate view of their local jurisprudence.⁷¹ The case demonstrates the building of a body of law, based not on

⁶⁹ *Wakefield v. Ross*, 28 F. Cas. 1346. Rhode Island. November 1827.

⁷⁰ Paul W. Kaufman, 'Disbelieving Non-Believers: Atheism, Competence, and Credibility in the Turn of the Century,' *Yale Journal of Law and the Humanities*, vol. 15:2 (2003), 416.

⁷¹ *Bell v. Morrison*, 26 U.S. (1 Pet.), 351 (1828).

theoretical principles but founded on proven regional custom and practice reflecting the needs of the local business and property owning community.

He also made it clear in *United States v. Slade* (1820) his relief at not having to give the first construction of a state statute when he could turn to state decisions for guidance. He believed the following of state decisions to be a matter of ‘public policy and public interest,’ to achieve consistency and certainty in litigation so that citizens did not have to contend with conflicting opinions of federal and state judges.⁷² That, wherever possible, he followed the decisions of state courts and upheld the constitutionality of state legislation, demonstrated he was not just an agent of a federal government determined to ride roughshod over states’ rights. He had a desire to forge a partnership between federal and state courts. This enhanced his popularity in New England. He was adept at sending out such messages in his circuit opinions.

He was somewhat apprehensive of his new role but quickly settled into the business of the Court and found himself very much at ease.⁷³ In letters to his friends, he gave a rare insight into the decision making process of the Court. Writing to Harvard colleague and probate judge, Samuel Fay, soon after his first sitting on the Court, he referred to the ‘frank intimacy of his brethren’ and reported that the ‘familiar conferences at our lodgings often come to a very quick and, I trust, accurate opinion in a few hours.’⁷⁴ The following week, Story assured his wife that the lodging house accommodation was very agreeable and was made so by the companionship of the other justices. ‘Perfect harmony’ was how he described the

⁷² *United States v. Slade*, 27 F. Cas. 1125. Mass. May 1820.

⁷³ Letter Joseph Story to Nathaniel Williams, February 16th, 1812. W.W. Story, *Life and Letters*, vol.1, 213-215.

⁷⁴ Letter, Joseph Story to Samuel P.P. Fay, 24th February, 1812. Ibid. 215-216.

justices' relationships.⁷⁵ This bonding borne out of a common philosophy and by communal living was essential to the solidary of the Marshall Court and was the foundation of the single opinion of the Court. That the justices were a band of brothers made it easier to compromise and speak with one voice.

In his 23 years on the Marshall Court, Justice Story delivered 183 opinions of the Court. Aside from Chief Justice Marshall who took the lion's share with 537 of 1236 opinions, no other justice matched Story's contribution. Justice Johnson was the nearest with 112 majority opinions in 29 years. Justice Duvall over the same period as Story contributed a mere 16 opinions and Justice Todd only 12 in 18 years. These figures show Story as the dominant Marshall Court associate justice and are accounted for by his learning, enthusiasm and capacity for hard work.⁷⁶ There was no honeymoon period. Story delivered two majority opinions in his first year, seven during 1813, and ten in 1814. No other associate justice experienced such a flying start.

His Supreme Court opinions comprised 57 admiralty matters, 48 Land disputes, and 28 commercial cases including contract and negotiable instruments all of which were his main areas of expertise in the circuit court. Putting his admiralty contribution in perspective one looks to the *United States Reports* which contain 252 admiralty opinions of the Marshall Court. Chief Justice Marshall reserved to himself 90 so that that Story's 57 opinions over 24 years constituted 35% of the balance. No other associate justice approached Story's impact on this speciality. Justice Johnson, over 29 years, delivered 35 opinions. Livingston achieved 18 over 16 years, and Washington handed down 17 in 29 years. That Justice Thompson delivered only five

⁷⁵ Letter, Joseph Story to Mrs Sarah W. Story, March 5th, 1812. Ibid. 217.

⁷⁶ The figures have been calculated from a count of the opinions in the *United States Reports* between 1801 and 1835.

admiralty opinions in 20 years is explained by the fact that the 1812 War and embargo cases were fading memories by the time of his appointment to the Court in 1823.

Story's hard-line attitude to embargo cases in the circuit court was maintained in his writing for the Court. He was resolute in enforcing breaches of embargo and penalizing evasion of custom duties. In ten such cases it was thought appropriate that he should write the unanimous or majority opinion affirming his own finding in the circuit court. This he did in *The Julia* (1814) by giving a short opinion and attaching his circuit decision, remarking that it had been shown to his brethren, a majority of whom had agreed with it.⁷⁷ He again affirmed his circuit opinion in *The Ship Octavia* (1816) this time by making extensive references to that opinion.⁷⁸ His rigid approach was demonstrated in the forfeiture proceedings concerning *The Pizarro* (1817) when he complained of the district court's failure to follow proper procedure. He believed that the lapse enabled the crew to concoct a defence. He felt that the ship's papers should have been produced in court and the crew asked individually to answer specific questions concerning the voyage and not allowed to give evidence after conferring with counsel.⁷⁹

Marshall decided which associate would write the Court's opinion and the *United States Reports* show a marked disparity in the allocation of opinion writing between, say, Justices Story and Duvall, indicating assignments on the basis of expertise in the subject matter and a willingness to write. Story was assigned so many admiralty opinions because his colleagues, and the Chief Justice in particular, were aware that maritime cases constituted the bulk of his work on circuit as

⁷⁷ *The Julia*, 12 U.S. 181 (1814).

⁷⁸ *The Ship Octavia*, 14 U.S. 20 (1816).

⁷⁹ *The Pizarro*, 15 U.S. 227 (1817).

advocate and justice. Therefore, they would be happy that he took the lead in the admiralty business because of his renown in the field.

Consistency by the Sharing of Expertise

Letters passing between Story and Marshall confirm the extent to which the Chief Justice relied upon Story in maritime cases and support the suggestion that Story would have had a hand in some of the ninety admiralty opinions delivered by Marshall and in opinions on other branches of the law.⁸⁰ The letter Story wrote to Samuel Fay in April 1814 reveals how Story contributed to the Court's opinion delivered by another justice. He described a heavy list and a prize law case which he did not identify, writing 'I worked very hard and my brethren were so kind as to place confidence in my researches.' He continued, '*Juniores ad Labores*' but did not complete the quotation which ends, '*Seniores ad honours*; a complaint that the juniors did all the hard work and the seniors took the credit.'⁸¹ If his researches had resulted in his being assigned the opinion, he would not have complained.

Marshall's letter to Story in July 1819 requested Story's help on the authority of the master of a vessel to hypothecate her in a state other than that of her home port. He had earlier asked Justice Washington the same question.⁸² In the July letter Marshall thanked Story for his assistance in another case, and informed him that he would decide next term the case of the *United States v. The Schooner Little Charles* in accordance with Story's reasoning which he thought was 'perfectly sound, and

⁸⁰ For examples see, Marshall to Story, July 13, 1819 in *Papers of John Marshall*, vol. 8, 352; Marshall to Story, June 15, 1821, *PJM*, vol. 9, p. 167; Marshall to Story, September 18, 1821, *PJM*, vol.9, 183.

⁸¹ Letter, Joseph Story to Samuel Fay, April 24, 1814 in W.W. Story, *Life and Letters*. vol. 1. 261.

⁸² Letter, James Marshall to Bushrod Washington, *The Papers of John Marshall*, vol. VIII. May 31, 1819, 315.

were this even questionable, the practice of the courts ought to be uniform.’ Marshall also confirmed that preparation of the Court’s opinion in ‘the militia case’ had been committed to Story and ‘could not be in better hands,’ but said that he would prepare an outline opinion himself and was confident that they would not differ.⁸³ In the event, Justice Washington delivered the Court’s opinion, and Story and one other justice, unnamed, but probably Marshall, joined in the dissent.⁸⁴ This letter is important because it reveals not only the practice of the Chief Justice seeking help from a colleague but also that when an opinion was committed to a specific judge, another judge would also sketch out an opinion. Furthermore, subsequent discussions showed Story not to hold the majority view, so the opinion was re-assigned to Justice Washington from whose court the writ of error came.⁸⁵

Marshall continued to seek advice from Washington and Story and after Washington’s death in November 1829 Marshall’s surviving letters reveal Story as the sole source of guidance. The following correspondence reveals Marshall’s requests for help from Story on an insolvency problem (1821); debt and forfeiture (1821); marine salvage and piracy (1823) a commercial case (1827) and admiralty (1831).⁸⁶ When the two friends were together in Washington, Story would be happy to assist the Chief Justice in any way possible. He always replied promptly to Marshall’s written requests with heavily researched opinions.⁸⁷ Writing to Story in

⁸³ The militia case was *Houston v. Moore*, 18 U.S. 1 (1820).

⁸⁴ It was usual for law reports to identify the justices who dissented but in this case Story merely wrote that he had ‘the concurrence of one of my brethren.’ Marshall was likely to be the other dissident in view of the letter of May 31, 1819 (n. 109).

Story, July 13, 1819. Both letters are in Charles F. Hobson (ed.), *The Papers of John Marshall*, vol. VIII (Chapel Hill: University of North Carolina Press, 1995), 315 & 352.

⁸⁶ Letter, June 15, 1821, (insolvency), *Ibid.* vol. IX. p. 167; Letter, September 18, 1821 (debt & forfeiture), *ibid.* vol. IX, 183; Letter, December 9, 1823, (salvage & piracy), *ibid.* vol. IX, 353; Letter, December 11, 1827 (commercial case), *Ibid.* vol. XI. p. 60 & Letter, May 23, 1831 (admiralty), *ibid.* vol. XII, 67.

⁸⁷ Letter, Joseph Story to John Marshall, July 26, 1819, in *Papers of John Marshall*, vol. VIII. 365-370.

November 1823, Marshall wished to know whether it was possible to have a mixed jury of citizens and non-citizens in a criminal case, having been by counsel that Justice Thompson had allowed such an application on circuit in New York. The letter also reveals Marshall's intention to discuss the point with the judges the following February to ensure a consistent approach across the circuits.⁸⁸ The letter is relevant not only to the practice of consultations on circuit but also to the quest for uniformity.

Consistency was also important to Story and Washington who regularly exchanged circuit opinions to achieve as much uniformity as possible. Writing in December 1826, Story promised Washington an abstract of all the cases he had dealt with on circuit that term. Thanking Washington for the opinions he had sent, Story noted that they had adopted the same practice in similar cases on a jurisdictional point.⁸⁹ The importance to Story of uniformity is evident from *Martin v. Hunter's Lessee* (1816) when, denying the right of state courts to interpret the Constitution, he wrote that it was not because of bias but a question of preserving uniformity of federal law.⁹⁰ Too many different interpretations would cause much confusion. This correspondence between justices establishes how important it was that justices exchanged information if a uniform system of federal law was to be achieved.

Story gave a hint of a lack of commitment by other justices when writing to Harvard Law Professor Ashmun in 1832, informing him that 'the Charlestown Bridge case had not yet been decided because some of the judges had not prepared

⁸⁸ Letter, John Marshall to Joseph Story, November 24, 1823 in Hobson, *Papers of John Marshall*, vol. IX, 346.

⁸⁹ Letter, Joseph Story to Bushrod Washington, December 9, 1826, cited in Howell J. Heany, *American Journal of Legal History*, vol.2, No. 1 (1958) 75.

⁹⁰ *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

their opinions when they met to discuss the case⁹¹ Even the Chief Justice found it difficult to cope with an ever expanding docket, writing to Story in 1829 that he had not been able to give to two great cases the consideration they deserved and he hoped that Story had been able to give them his attention and asked that he put his thoughts on paper.⁹² These letters again show Story's professional approach. He was in a league of his own when it came to the effort he put into his work on circuit and on the Court and all this while editing and writing formidable works of legal jurisprudence, and teaching law at Harvard University.

Circuit opinions gave Story the opportunity to make his mark on a number of branches of the law but permitted him no impact on constitutional law. He remedied that omission shortly after joining the Court in his opinion in *Mills v. Duryee* (1813) holding that, if a judgment was conclusive in one American state, it must be recognized and enforced in other states under the 'full faith and credit' clause of Article 4, section 1 of the Constitution.⁹³ He delivered his most influential constitutional opinion three years later in *Martin v. Hunter's Lessee*, which, as well as asserting the power of the Court over federal departments and state legislatures and tribunals, evidenced the marked political and philosophical change from the mild Republican tendencies of his early years to the ardent supporter of a strong national government and federal judiciary.⁹⁴

In *Martin*, the Virginia Court of Appeals refused to accept the holding of the Supreme Court in a land dispute delivered in the February 1813 term, on the ground that section 25 of the Judiciary Act 1789 giving the Supreme Court the power to

⁹¹ Letter, Joseph Story to Professor Ashmun, March 1. 1832, in W.W. Story, *Life and Letters*, vol. 2. 91.

⁹² Letter, John Marshall to Joseph Story, July 3, 1829, in *Papers of John Marshall*, vol. XI, 262.

⁹³ *Mills v. Duryee*, 11 U. S. (7 Cranch) 481 (1813).

⁹⁴ 14 U.S. 304 (1 Wheat.) (1816).

review the decisions of state tribunals infringed the Constitution. Story resolved this stand-off on a matter of great constitutional consequence in a very firm manner when the case returned on a writ of error. He held that the Supreme Court had appellate jurisdiction over state court decisions which purported to interpret federal law. He argued that federal power was given by the people and not by the states and pointed to Article III, Section 2, Clause 2 of the Constitution which expressly provided for the Supreme Court to have appellate jurisdiction on law and fact in all cases mentioned in the section where it has no original jurisdiction. He addressed the mischief which would arise if state tribunals were permitted to interpret federal law, treaties and even the Constitution without the appellate oversight of the Supreme Court. Judges of equal learning and integrity in the various states might well reach different conclusions, throwing federal law into total confusion. The emphasis on the people, and not the states, as the source of authority for the Constitution is key to the philosophy of Marshall and Story and enabled the Court to interpret the intent of the Founding Fathers in such a way as to provide for a strong national government, but at the same time, guaranteeing the citizens' property and commercial rights.

The Court's declaration in *Marbury v. Madison* (1803) that the *Judiciary Act 1789* was unconstitutional on the ground that Congress was not permitted by the Constitution to extend the Court's original jurisdiction was a crucial step in Marshall's quest to strengthen the Court's authority.⁹⁵ Story's recognition, in *Martin*, that the Constitution gave the Court an appellate supervisory role of state courts further enhanced the Court's status giving it the confidence to extend its

⁹⁵ *Marbury v. Madison*, 5 U.S. 137 (1803).

sphere of influence in three constitutional cases decided in a three week period in early 1819.⁹⁶

In *Sturges v. Crowninshield*, the Court held that a New York law which purported to apply a bankruptcy law retroactively violated Article 1, Section 10 of the Constitution because it impaired the ‘Obligation of Contracts.’ Impairment of the obligation of contracts raised its head once more eight days later in the *Dartmouth College* case. Yet again, and in such a short space of time, the Court struck down a state statute, Marshall holding, controversially, that a charter granted to the college by the British Crown in 1769 constituted a contract. This meant that an attempt by New Hampshire’s legislature to gain control of the college by altering its status from a private to a public institution, violated the contracts clause. Story delivered a powerful concurrence, and using the example of a bank or insurance company, expressed great concern at the prospect of a legislature attempting to replace the directors appointed by the stockholders with people who had no connection with the company. His holding and Marshall’s opinion, would have re-assured the commercial community that the Court supported free enterprise and would protect the interests of business corporations from federal or state interference.

The Court further enhanced its influence two weeks later in *McCulloch v. Maryland*, when it held that Congress had the power to establish a national bank and Maryland’s tax on the bank, because it was not chartered by the Maryland

⁹⁶ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (opinion delivered Feb 17, 1819); *Trustees of Dartmouth College v. Woodward*, 17. U.S. (4 Wheat.), p. 518 (opinion delivered February 25, 1819); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.), p. 316 (opinion delivered March 10, 1819). The time taken between the conclusion of arguments and the handing down of opinions in these great constitutional cases varies considerably. *Sturges*- 8 days; *McCulloch*- 3 days and *Dartmouth College*, which clearly caused the justices some heart-searching, took 50 weeks to resolve. For a very helpful list of dates of arguments and delivery of opinions of Supreme Court cases between 1791 and 1882, see Ann Ashmore, Library of Supreme Court of United States, August 2006.

legislature, was prohibited by the Constitution.⁹⁷ Maryland's action was a direct challenge to the federal government's right to impose its authority upon a state, and the Court determined, by reference to the Constitution, to define the extent of the powers of Congress, and to demonstrate that states' rights were subordinate to the acts of the national legislature. Although the Constitution did not expressly grant to Congress the power to establish the Bank of the United States or any bank, writing for a unanimous Court, the Chief Justice held that such a power was to be inferred from Article 1, Section 8, Clauses 1 and 18 of the Constitution. Clause 1 gave Congress the power to...provide for the general welfare of the United States and, by Clause 18, Congress received the authority to make all laws 'necessary and proper' for carrying into effect powers earlier enumerated in the section which included the powers to coin money, collect taxes, borrow money and regulate commerce between the states. The establishment of a national bank, whilst it itself not 'necessary and proper,' was absolutely essential if Congress was to exercise those fiscal responsibilities entrusted to the national legislature by the Constitution. The establishment of the national bank was a procedural step to implement the powers granted to Congress. Having concluded that the establishment of the bank was within the Constitution it was a small step for Marshall to hold that Maryland's attempt to tax the bank was unconstitutional as the United States law establishing the bank was, by virtue of Article 6 of the Constitution, the supreme law of the land, binding upon the legislatures and tribunals of every state.⁹⁸

⁹⁷ *McCulloch v. Maryland*, 17 U.S. 316.

⁹⁸ For an in depth analysis of *McCulloch v. Maryland*, see, Mark R. Killenbeck, *M'ulloch v. Maryland: Securing a Nation* (Lawrence: University Press of Kansas, 2006). See also Gerald Gunther (ed.) *John Marshall's Defense of McCulloch v. Maryland* (Stanford: Stanford University Press, 1969) in which he analyses Marshall's responses to the heated newspaper attacks made upon him by the Republican Judge Spencer Roane of the Virginia Court of Appeals.

Thus, in the space of three weeks, the Court had established not only the supremacy of the federal government over claims of state sovereignty but also the position of the Court as the sole interpreter of the language and meaning of the Constitution by construing it in a such a way as to strengthen the union and send a message to the more vociferous states' rights activists of the Supreme Court's determination to uphold all federal laws and institutions authorised by a Constitution, ratified not by the states but by the citizens of the United States.

Story had a further opportunity to rehearse his constitutional philosophy in *Green v. Biddle* (1823). Virginia had entered into a compact to cede to the United States the land which subsequently became the state of Kentucky with a condition that existing land grants would be recognized. He held that Kentucky statutes restricting those grants were constitutional infringements of the compact which was protected by the 'full faith and credit' clause of Article 4, Section 1 of the Constitution. Kentucky sought a rehearing at which Justice Washington confirmed Story's view.⁹⁹

Story shaped commercial law by stressing the position of negotiable instruments as the cornerstone of trade in *Mandeville v. Welch* (1820), holding that bills of exchange and promissory notes were distinguishable from all other forms of contract because they were prima facie evidence of valuable consideration between the original parties and against third parties.¹⁰⁰ He was also active politically, drawing up a memorandum to Congress in June 1820 on behalf of the merchants of Salem protesting the intention of Congress to discontinue credits on revenue bonds, abolish drawbacks, and other restrictions on commerce; controls which in his view

⁹⁹ *Green v. Biddle*, 21 U.S.(8 Wheat.) 1 (1823)

¹⁰⁰ *Mandeville v. Welch*, 18 U.S. (5 Wheat.) 277 (1820).

would ‘injure, if not eventually destroy some of the most important branches of the commerce and navigation of the United States.’ The memorandum was lengthy, well-reasoned, and displayed a detailed, practical and theoretical understanding of business economics and was well received by Salem men of commerce.¹⁰¹

As has been observed, merchant seamen benefited from Story’s opinions alleviating the rigours of an often harsh existence. They had the benefit of those fundamental unalienable rights of ‘Life, Liberty and the pursuit of Happiness’ guaranteed to them by the Declaration of Independence but, in practice, denied to African slaves and Native Americans. As the southern state courts refused to recognize these basic rights, the only hope of redress for the disadvantaged lay with the federal courts. On the Court, Story did his best for the oppressed Cherokees but failed to aid the subjugated African-American.¹⁰²

Story’s protection of Native Americans got off to a poor start in *Johnson v. M’Intosh* (1823) when he silently acquiesced in the unanimous opinion delivered by Marshall that the Indian tribes did not own the land on which they lived. They were mere tenants at the will of the United States, to whom the land, formerly owned by the Crown by right of discovery, had passed upon independence.¹⁰³ Story made amends in *Cherokee Nation v. Georgia* (1831) when the Cherokees sought to invoke the original jurisdiction of the Court by way of an injunction to prevent Georgia from exerting repressive laws over their nation. The majority held the Cherokee Nation not to be a foreign state but merely a ‘domestic dependent nation,’ and, therefore, the Court had no jurisdiction under Article III of the Constitution. Justice

¹⁰¹ Memorial to Congress, in W.W. Story, *Life and Letters*, vol. 1. 371-376.

¹⁰² The attitude of the southern states’ courts, particularly towards the Cherokee, Creek & Choctaw Nations, is fully explored in Tim Alan Garrison, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (Athens: University of Georgia Press, 2002).

¹⁰³ *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

Thompson in his dissenting opinion, joined in by Story, declared the Cherokees a foreign state within Article III and that an injunction was necessary to prevent further breaches of Cherokee treaties by Georgia.¹⁰⁴ Story, writing to Richard Peters at the conclusion of the case, expressed his feelings on the plight of the Cherokees when he ‘rejoiced that Mr Justice Thompson has done what I requested, that is, stated my concurrence with him. I am more than satisfied we are right.’¹⁰⁵

In *Worcester v. Georgia*, (1832) Story was a member of the Court which held unlawful Georgia’s imprisonment of a missionary who had entered Cherokee lands without obtaining a licence from the state. The Court declared unconstitutional Georgia’s law imposition of such a requirement, holding that the United States had the sole right of dealing with the Indian Nations. Although not accepting the Cherokees as the owners of the land, the Court sent a clear message to Georgia that a state had no right to harass the Cherokees. Unfortunately it was a pyrrhic victory as Georgia continued to force the Cherokees off their land and President Andrew Jackson refused to intervene.¹⁰⁶

Story’s letters provide evidence of his feelings which could never express in a formal opinion, but provide an insight into his support for the majority opinion in Worcester. Before John Marshall delivered the opinion, Story wrote to his wife that he had been so impressed with by the two Cherokee chiefs he had met in Philadelphia but feared for the destruction of their race. He felt ‘as an American, disgraced by our gross violation of the public faith towards them.’¹⁰⁷ Writing to Professor George Ticknor after the opinion had been delivered, Story correctly

¹⁰⁴ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

¹⁰⁵ Letter, Joseph Story to Richard Peters, June 24, 1831, I, W.W. Story, *Life and Letters*, vol. 2. 46.

¹⁰⁶ *Worcester v. Georgia*, 31. U.S. (6 Pet.) 515 (1832).

¹⁰⁷ Letter, Joseph Story to Mrs Joseph Story, January 13, 1832, in W.W. Story, *Life and Letter*, vol. 2. 79.

predicted that Georgia, ‘full of anger and violence, would continue to harass the Cherokees and that the President would not interfere.’ He continued ‘The Court has done its duty, Let the nation do theirs.’¹⁰⁸ The letters are noteworthy in two respects. Apart from revealing Story’s compassion for the Cherokees and his disgust at the nation’s treatment of them, it also shows his realization, that despite the rise in influence of the Court by the 1830’s, its orders were completely ineffective when faced with an intransigent state unwilling to obey them, and an unfriendly President, content to see them ignored.

Story’s sympathy for subjugated classes of society is evidenced by his efforts to stamp out the international slave trade. His circuit opinions demonstrated a determination to enforce stringently the 1807 Slave Trade Act prohibiting such traffic but he had little opportunity, writing for the Marshall Court, to expound his views. In *The Plattsburgh* (1825) he ordered forfeiture of a vessel for slave trade breaches where the original voyage began in the United States and held that the Court had jurisdiction whether or not the vessel was owned by citizens or foreigners.¹⁰⁹ His views on the slave trade were re-stated and received world-wide attention in the Supreme Court opinion he wrote for the Court in *The Amistad*, an important case considered by the Supreme Court at that time on that issue.¹¹⁰ Although decided in 1841, six years after the death of John Marshall, and, therefore, outside the scope of this research, no analysis of Story’s moral and judicial attitudes towards the kidnapping and transportation of Africans would be complete without a consideration of this opinion. He held that those abled bodied, of the 36 African men and boys and three girls, who had risen up, killed the master and taken over the

¹⁰⁸ Letter, Joseph Story to Professor Ticknor, March 8, 1832. Ibid. 83.

¹⁰⁹ *The Plattsburgh*, 23 U.S. (10 Wheat.) 133 (1825)

¹¹⁰ *The Amistad*, 40 U.S. 578 (1841).

vessel, were exercising their right to freedom. The Court accepted them to be native born free Africans who had been unlawfully kidnapped and forcibly transported aboard a vessel engaged in the 'heinous' slave trade, and discharged them from custody, free to return to their homeland. They were not property to be returned to Spain.

Although Story rigorously enforced the 1807 Act, he was unable to help those slaves already in the United States. The Constitution, whilst not expressly using the word slave, in Article IV, Section 1, Clause 3, permitted the recapture of 'any person held to service or labour in one state' who had escaped to another state. In *Prigg v. Pennsylvania* (1842) Story, writing the majority opinion, upheld the Fugitive Slave Act 1793 and overturned the conviction of a man who had forcibly removed from Pennsylvania and returned a woman and her children to her 'owner' in Maryland. The removal contravened the 1826 Pennsylvania Personal Liberty Law which provided for a judicial investigation before removal. Story held the Fugitive Slave Act constitutional because it was within Article IV. The Court struck down the Pennsylvania statute purporting to aid fugitives on the basis it ran contrary to the Constitution and federal law.¹¹¹ Story laid emphasis on the belief that the Southern States would not have joined the Union had that clause been omitted from the Constitution. The holding was a victory of federal law over state law, in that only the federal authorities had the power to administer the Act was small comfort to the woman and her children returned to slavery in Maryland. Story's strict adherence to the Constitution prevailed over his religious and humanitarian beliefs that slavery was an evil institution.

¹¹¹ *Prigg v. Pennsylvania*, 41 U.S. 539 (1842).

His academic achievements were of great importance because they underpinned his judicial contribution. Appointed the Dane Professor of Law in 1829, he strengthened the Harvard Law School and successfully promoted academic training for lawyers, replacing the sometimes hit and miss apprenticeship in a lawyer's office. He introduced his students to the study of law through text books, lectures, and moots, and brought to life dry topics by relating his experiences on circuit and on the Court.¹¹² Story's academic output would have been prodigious for a man focussed wholly on scholarship. His industry was even more remarkable considering his commitment to the Court and the First Circuit. Between 1809 and 1845 he edited or wrote thirteen works covering many branches of law, and, at the time of his death in 1845, he had begun to write *Commentaries on Admiralty* and *Commentaries on the Law of Nations*, and an autobiography.¹¹³ Arguably Story's most important academic contribution to United States law was his three volume *Commentaries on the Constitution of the United States* (1833). Justice Oliver Wendell Holmes speaking to the Harvard Law School Association in 1886 was fully justified, when referring to 'Story's epoch making *Commentaries*,' in asserting that 'he has done more than any other English speaking man in this century to make the law luminous and more easy to understand.'¹¹⁴

¹¹² For a full account of Story's academic achievements at Harvard see, Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817-1967* (Cambridge: The Belknap Press of Harvard University Press, 1967), 92-139.

¹¹³ *Chitty on Bills of Exchange & Promissory Notes* (1809); *Abbott on Shipping* (1810); *Laws of Assumpsit* (1811); *Commentaries on the Constitution*, 3 vols. (1833); *Commentaries on the Law of Bailments* (1834); *Commentaries on Conflict of Laws* (1834); *Discourse on Past History, Present State & Future Prospects of Law* (1835); *Commentaries on Equity Jurisprudence* (1836); *Commentaries on Equity Pleadings* (1838); *Commentaries on Agency and Maritime Jurisprudence* (1839); and *Commentaries on Promissory Notes* (1845).

¹¹⁴ Oliver Wendell Holmes, *Collected Legal Papers* (New York: Peter Smith, 1952), 41-42.

Importing Common Law into the Federal Legal System

It should be observed, immediately, that Story wished for a common law which could be modified to meet the needs of the United States. He said, when writing for the Court in *Van Ness v. Pacard* (1829), ‘The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles and claimed it as their birth-right, but they...adopted only that portion applicable to their situation... The country was a wilderness, and the universal policy was to procure its cultivation and improvement.’¹¹⁵ Story was referring to the need for stability, the accommodation of an increasing population, and economic growth. He made it clear in a letter he wrote to the Supreme Court reporter, Henry Wheaton, in 1825, that his wish to codify United States law was borne not out of a visionary desire to establish new law but to make existing laws more accessible and understandable to the general public and to avoid the ‘labours and exhausting researches of the profession.’¹¹⁶

He did more than any other justice to promote English common law as the basis of United States jurisprudence, arguing that ‘The whole structure of our jurisprudence stands upon the original foundations of the common law.’¹¹⁷ He began, on circuit, by using common law to remedy criminal conduct not then covered by United States statutes, disagreeing with Justice Samuel Chase who, in *United States v. Worrall*, (1798) had insisted that before an act became a crime, it was for Congress to define the offence, fix a penalty, and give jurisdiction to a court

¹¹⁵ *Van Ness v. Pacard*, 27 U.S. 137 (1829).

¹¹⁶ Letter, Story to Wheaton, October 1, 1825 in Henry Wheaton Papers, Pierpoint Morgan Library, cited in, James McClelland, *Joseph Story and the American Constitution* (Norman: University of Oklahoma Press, 1971), 93.

¹¹⁷ Joseph Story, *Commentaries*, vol. 1, 140.

to deal with the matter.¹¹⁸ Chase's circuit view was not followed by other justices on circuit but prevailed in the Supreme Court fourteen years later in *United States v. Hudson and Goodwin*, an allegation of libel on the President and Congress.¹¹⁹ That neither the Attorney General nor defence counsel argued the point made the decision to deny a common law jurisdiction in crime that much easier. The reasoning in Justice Johnson's opinion of the Court was as much political as legal and is shown by his declaring the question 'as having long been settled by public opinion.'¹²⁰ The decision was not unanimous and, as there were no written dissents, it is not possible to identify those justices who refused to join the majority. Preyer (1986) believes the dissentients to have been Justices Washington and Story. She includes Story because within three months of the *Hudson* decision he was pressing government to authorize federal courts to use the common law to deal with public crimes not covered by statute.¹²¹

Unable to achieve a political solution, Story used the circuit court as a public platform to express his dissatisfaction with *Hudson*. In *United States v. Clark* (1813), when unable to deal with an allegation of perjury as a common law offence, Story remarked that he had never been able to satisfy himself as to the accuracy of *Hudson and Goodwin*.¹²² In the same term as *Clark*, Story attempted to draw a distinction between common law offences in the admiralty jurisdiction as opposed to the general criminal law, holding that the forcible taking of a prize was an offence contrary to common law in admiralty. Because the district judge disagreed the

¹¹⁸ *United States v. Worrall*, 2 Dallas 384 (1798).

¹¹⁹ *United States v. Hudson and Goodwin*, 7 Cranch 32 (1812).

¹²⁰ *Ibid*, 32.

¹²¹ Kathryn Preyer, 'Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic,' *Law and History Review*, IV, 223-265 (1986) reproduced in Bilder, Marcus and Newmyer (eds), *Blackstone in America: Selected Essays of Kathryn Preyer* (New York: Cambridge University Press, 2009), 212-213.

¹²² *United States v. Clark*, 25 F. Cas. 441. Mass. October 1813.

matter came before the Supreme Court on a certificate of division of opinion. Story lost the day. Justices Livingston and Washington were prepared to join Story in reviewing *Hudson and Goodwin* but the Attorney General refused to argue the case, and Justice Johnson, delivering the Court's opinion, once more had an easy task to reject the existence of common law jurisdiction in admiralty.¹²³ Undeterred, Story changed tack and endeavoured to achieve consistency in federal criminal law by drafting a criminal code which later saw life as the Crimes Act 1825. The Act remedied the deficiencies of the Crimes Act of 1790 which made no provision for federal offences such as rape, burglary, arson, and many other serious crimes. It should be noted, however, that any deficiencies in federal criminal laws had a limited effect on the general administration of justice as the vast majority of criminal offences were dealt with under state laws.

His efforts to gain recognition of a common law jurisdiction in crime and admiralty having failed, Story turned his attention to commercial law and, in particular, to the federal courts' jurisdiction in diversity cases where the parties were from different states. In *Swift v. Tyson* (1842), writing for the Court, Story held that whilst the federal courts were obliged to apply state statutory laws they could ignore state common law as the state courts' decisions were merely evidence of what the law was. In the absence of an applicable state statute, the federal courts were entitled to formulate and apply rules of federal common law.¹²⁴ Story regarded a body of federal common law essential to a uniform system of business law across the nation. Despite the fact that the decision was generally regarded as a diminution of state sovereignty, *Swift v. Tyson* stood for almost one hundred years until overruled by

¹²³ *United States v. Coolidge*, 14 U.S. 415 (1816).

¹²⁴ *Swift v. Tyson*, 41 U.S. 1 (1842).

Erie Railroad Co. v. Tompkins (1938).¹²⁵ Unsuccessful in importing English common law into United States criminal and admiralty law, Story persevered and achieved his objective with federal commercial law.

Conclusion

The many circuit and Supreme Court opinions of Justice Story reveal him as a justice who contributed to United States jurisprudence on many fronts, the most importance of which was his development of admiralty law both on circuit and on the Court. His circuit opinions reveal that he had more experience of admiralty cases than any other justice. That he wrote far more admiralty opinions for the Court than any other justice supports the view that he was the acknowledged expert. A comparison of his circuit and Supreme Court opinions show him to have had a consistently hard-line approach to breaches despite his opposition to embargo as a New England politician and as an advocate who defended many a ship's master in forfeiture proceeding; a change of tack necessitated by his judicial role.

Story led the way in the strict enforcement of the embargo prohibition and set a standard for other justices to follow. In *The Boston* he called for a vigorous examination of defences to breaches of embargo laws to prevent a flood of what he considered to be spurious excuses, and, as he declared in *The George*, the increasing number of collusive captures of vessels. He felt that other justices were too ready to accept dubious excuses and said so in *Robinson v. Hook* when the widespread nature of the breaches was revealed in captured documents. He declared allegations of embargo breaches offences of strict liability and, in *The Short Staple*, he reversed the

¹²⁵ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64.

burden of proof by holding that the owner or master of the vessel must show that the route deviation was necessary. He did the same in *Ten Hogshead of Rum*. This robust disposal of cases led to two reversals by the Court, in *The Short Staple* and in *The Bothnea and The Jahnstoff*. The Court held in both cases that Story had been too quick to condemn. Story dissented in the *Short Staple*, feeling strongly that the master had hoodwinked the Supreme Court. Despite Story's personal feelings, these cases show that, as a justice sworn to uphold the law, he was duty bound to enforce the embargo laws. That he did so with vigour and encouraged other justices to do likewise, reflected the great animosity felt by the nation towards Britain's invasion of American soil during the War of 1812. The fact that the harmful economic effects of the embargo were more keenly felt by America than Britain mattered not. The Courts were there to enforce the will of the people through the edicts of the Congress.

Story's admiralty contribution extended beyond the embargo cases. In *Harden v. Gordon et al*; *The George*; *Orne v. Townsend*; and *United States v. Ruggles*, he tempered the harsh realities of life at sea by laying down rules which protected the wages and working conditions of masters and seamen and, at the same time, went some way towards ensuring that merchant ships were adequately manned. He clarified the law and evidential burdens in marine insurance cases on such misrepresentations as to seaworthiness, sailing dates, and deviations from route which were material to the risk and avoided the policy. (*Tidmarsh v. Washington Fire & Marine Insurance Co, Inc*; *Bayard v. Massachusetts Fire & Marine Insurance Co. Inc*; *Glidden v. Manufacturers' Insurance Co.*). The importance of Story's most notable marine insurance opinion, *Delovio v. Boit et al*, holding that the federal courts had jurisdiction under the Constitution over marine insurance cases, is

demonstrated by the fact that it was a circuit opinion followed by the Court in *Insurance Company v. Dunham* some fifty-five years later.

The extent to which the United States or individual states had adopted English common law was very much an issue during the formative years of the federal courts and Story was in the forefront of that debate. He believed the common law to be the fundamental basis of federal law but that it should be modified in such a way as to meet the particular needs of the American people. His efforts to import common law into the criminal jurisdiction foundered with the Court's decision in *United States v. Hudson & Goodwin* and his further attempt to deal with perjury at common law failed in *United States v. Clark*. He did, however, achieve success in clarifying the criminal law when his draft code saw life as The Crimes Act 1825. Story was again reversed by the Court when his attempt to import common law into admiralty law failed in *United States v. Coolidge* but his perseverance paid off in *Swift v. Tyson* when he established that, in diversity cases, the federal courts were entitled to apply rules of federal common law in diversity cases. The importance of Story's impact in this aspect of United States law is that *Swift v. Tyson* stood for almost 100 years. His objective in promoting the common law, as it was with his codification of the law, was to give United States law more certain foundation to enable citizens and their legal representatives to have a better understanding of their rights and obligations.

Story's opinions and correspondence are valuable insights into the inner workings of the Marshall Court and the justices' resolve to achieve the necessary uniformity of federal law and procedure to ensure a smooth transition from colony to republic. The letters passing from Marshall to Story reveal how the justices assisted each other with issues they met on circuit and the exchange of semi-annual reports between Story and Washington of interesting cases on their respective circuits

indicate the importance to the justices of consistency in decision-making throughout the federal jurisdiction. *Martin v. Hunter's Lessee* is a good example of Story's desire for uniformity. His denial of the right of state courts to interpret the Constitution was based solely on the need for uniformity and to avoid the confusion of opinions which might vary from state to state. Story's letters to his friends reveal how keenly the justices felt the need to present an authoritative face to the nation with the single opinion of the Court; how the pleasant collegiality of the justices' lodging house facilitated unanimity; and how, despite the view of some scholars that most associates contributed little, there was full discussion before decisions were reached.

Joseph Story was by far the most effective associate justice of the Marshall Court. His was the greatest contribution to the Court and to the shaping of United States law. His development of the admiralty jurisdiction, his codification of criminal law, the establishment of common law as the basis of federal commercial law in disparity cases, and his willingness to assist other justices to achieve uniformity, mark him as a judge whose influence on United States law played its part in the stability of the Early Republic.

Chapter Five

Justice Smith Thompson: Promoting Commerce, State Sovereignty, and the Protection of Minority Interests

Justice Smith Thompson is another associate justice of the Marshall Court whose jurisprudence has been largely ignored by scholars, despite his service as a state and federal judge for thirty-six years. All past examinations of his career have emphasized his political aspirations; his ambition to be President of the United States and New York State Governor. This research looks beyond efforts to achieve high political office to evaluate his jurisprudence by an examination of his state and federal opinions and to establish the extent to which those opinions contributed to the shaping of United States law between 1802 and 1835. Whilst the opinions disclose a considerable expertise in commercial law based on a desire to encourage trade and free enterprise, the chapter focusses the two most important aspects of his judicial writing. First, before he went to the U.S. Supreme Court, his efforts to promote the right of states to govern their own affairs without excessive federal government interference and second, whilst on the Court, his attempts to interpret and influence federal law in such a way as to protect the perilous position of the Native American and African slave.

There is no recent scholarship on Thompson and no analysis of his work as a Supreme Court justice sitting on circuit. Dunne's seventeen page outline, in Friedman & Israel, was written forty-three years ago.¹ Roper's excellent biography, although published in 1987, was a PhD thesis submitted fifty years ago and focusses on Thompson's political aspirations, his time on the New York Supreme Court, and

¹ Gerald T. Dunne, 'Smith Thompson,' in Leon Freidman & Fred L. Israel, *The Justices of the United States Supreme Court, 1789-1969; Their Lives and Major Opinions* (New York: Chelsea House Publishers, 1969), 475-492.

contribution to the opinions of the Marshall Court. Roper did not examine Thompson's opinions on circuit in New York, Connecticut and Vermont.² White wrote an eleven page portrait of Thompson which emphasized his political aspirations but that was some twenty-five years ago.³ It follows, therefore, that this research is the first in depth examination of both Justice Thompson's state and federal circuit opinions in order to understand the development of his jurisprudence in each jurisdiction.

Other scholars agree with White that Thompson was a man desperately seeking high political office. They base their views on the fact that, notwithstanding having received an offer of a seat on the Supreme Court, he sought support as a presidential candidate and, whilst a serving Supreme Court justice, he stood unsuccessfully against Martin van Buren for the governorship of New York in 1828. Clearly Thompson's involvement in New York politics and his time as Secretary of the Navy gave him a taste for political power. Dunne described Thompson as 'one of the most politically active and ambitious Justices ever to sit on the Supreme Court';⁴ a view echoed by Hall (2001) in a four page sketch, highly critical of Thompson, painting him as 'a man of insatiable political appetites.'⁵ When too much emphasis is placed by scholars on Thompson's political aspirations there is a real risk that his jurisprudence is neglected. His political manoeuvring has no bearing on his

² Donald Malcolm Roper, *Mr Justice Thompson and the Constitution* (New York: Garland Publication, 1987) A dissertation submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy, Indiana University, Bloomington, July 1963.

³ G. Edward White, *The Marshall Court and Cultural Change*, 307-318. Eight of the eleven pages detail Thompson's efforts to achieve political office.

⁴ Dunne, 'Smith Thompson,' 475.

⁵ Timothy L. Hall, 'Smith Thompson,' *Supreme Court Justices: A Biographical Dictionary* (New York: Facts on File Inc., 2001, 70-73, 70).

performance as a justice which is why this chapter focusses on his state and federal jurisprudence.

There is in the scholarship only passing mention of Thompson's work as a judge. Hall regards Thompson as a justice of only modest ability whose tenure was 'a mostly unremarkable service.'⁶ Dunne's evaluation of Thompson is not as harsh but he has difficulty in deciding whether he was a real man of stature.⁷ Whilst nowhere near as active as Marshall and Story, Thompson, like Livingston, was far removed from the near silent acquiescence of Justices Todd and Duvall. An examination of his state and federal opinions reveals a significant contribution to the shaping of American law in the fields of contract law and states' rights. He was also a justice prepared to speak out in support of causes he held dear which defied the convention of unanimity and put him in dissent, particularly by his support for the Cherokee Nation in their fight for relief from Georgia's oppression.

Both Dunne and Hall address the impact of Thompson's presence on the deliberations of a Court largely composed of justices holding Federalist views. Dunne describes Thompson as 'a frontrunner...leading the reaction against Chief Justice Marshall's ideas on the pre-emptive nature of centralist federalism'; pre-emptive in the sense of a tactical interpretation of the Constitution to consolidate the power of national government.⁸ Hall rightly points out that Thompson's presence on the Court in *Ogden v. Saunders*, (1827) placed Marshall in dissent.⁹ He goes a step further by asserting that Thompson's presence on the Court 'spelled... the gradual

⁶ Hall, 'Smith Thompson,' 70.

⁷ Dunne, 'Smith Thompson,' 490.

⁸ Ibid. 475.

⁹ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). Thompson joined Washington, Johnson & Trimble in holding that a New York insolvency law which relieved debtors of their obligations in respect of debts created after the passing of the law did not violate the prohibition in the Constitution of any law impairing the obligation of contracts. Story and Duvall joined in Marshall's dissent.

eclipse of John Marshall's momentous influence over the course of American law.¹⁰ However, Thompson's recorded dissents only offer mild criticism of Marshall's federalist centralism. He dissented in only one in eighty cases on the Marshall Court as opposed to one in ten on the New York Supreme Court.¹¹ He was not as active in opposition as his colleague Justice William Johnson who between 1824 and 1833 wrote fifteen dissents out of a total of four hundred and forty-four cases, a ratio of approximately one in thirty cases.¹² Abraham (1974) observes that, although Thompson occasionally stood up to Marshall toward the end of the Chief Justice's tenure, like most others, he generally fell under Marshall's influence despite their political differences.¹³ I see the main reason for Thompson generally falling in line with his brethren as not due to Marshall's charm but rather to his acceptance of the need for unanimity.

State Supreme Court: Statutory Interpretation and New York 'Hard Law'

By the time he was nominated by President James Monroe in 1823 for a seat on the United States Supreme Court, Thompson had already held high political and legal office, having been elected to the New York State Legislature in 1800 and the following year serving as a delegate to the New York Constitutional Convention. In 1802 he was appointed to the New York Supreme Court where he served as an associate justice for twelve years until named as Chief Justice, resigning in 1818 in

¹⁰ Hall, 73.

¹¹ The proportions of Supreme Court dissents are calculated by joining the data in Roper, 110 with the chart of Donald Morgan, William Johnson: The Great Dissenter, 189 and counting the number of Supreme Court cases between 1824 and 1835 which results in 7 dissents from 551 cases.

¹² Calculated from the number of cases in the United States Reports and a combination of the dissents set out in the charts of Roper and Morgan set out above.

¹³ Henry J. Abraham, *Justices, Presidents and Senators* (Lanham: Maryland: Rowman & Littlefield Publishers, Inc., 1999), 69. First edition, 1974.

order to take up the duties of Secretary of the Navy in President Monroe's cabinet. It follows that when he began sitting on the United States Supreme Court in 1824, he brought with him the huge political and legal expertise gained over almost a quarter of a century and was well qualified to have an impact on the development of federal law.

Thompson achieved high judicial office because, ability apart, he was very well connected. He was born in Dutchess County, New York in 1768. His father was a prosperous farmer who had been an anti-federalist delegate to the New York ratification convention of 1788. Thompson was graduated from Princeton in 1788 and read law in the local office of James Kent with whom he would later spend many years on the New York Supreme Court. In 1792 he went into partnership with Kent and Gilbert Livingston, a member of the very politically powerful New York family whose Republican leanings dominated state politics for many years. His integration into the family was complete when he married, in 1794, Gilbert's daughter Sarah, cousin of Brockholst Livingston whom Thompson was to replace on the Marshall Court.¹⁴

As with Justice Washington, precedent loomed large in Thompson's jurisprudence. In *Jackson v. Sill* (1814) Thompson remarked that it was preferable to follow established legal principles even though it might mean injustice in particular cases. He was against bending legal principles to suit a particular case.¹⁵ Thus, on occasion, consistency triumphed over justice. He was also reluctant to hold as unconstitutional any New York state laws. Apart from a general inclination to preserve the status quo and uphold states' rights, Thompson was unwilling to strike

¹⁴ The above biographical details are taken from Gerald T. Dunne, 'Smith Thompson,' in Friedman and Israel, *Justices of the United States Supreme Court*, supra, 475-476.

¹⁵ *Jackson, ex dem. Van Vechten et al. v. Sill et al.*, 11 *Johnson's Reports*, 201, 220 (1814).

down state legislation. This was because he had sat on the New York Council of Revision whose task, between 1777 until its abolition in 1821, was to review all bills before they became law. The Council had the power to return the bill to the legislature with written objections for reconsideration. On extremely rare occasions bills were passed despite objections provided there was a two thirds majority of the Senate and the Assembly. Between 1800 and 1821 of seventy bills vetoed by the Council, only seven bills became law despite Council objections and during his time on the Council, Thompson raised objections to only four bills.¹⁶ It was, therefore, most unlikely that a justice who had played a large part in the passage of legislation would be eager to declare that law unconstitutional. This was the result of the failure of an immature system of government to follow the concept, crucial to any democracy, of separating the powers of the state legislature and the judiciary.

Thompson went further in his support of legislation by examining the background to state legislative acts when, in *People v. Utica Insurance* (1818), he declared that the Court must look to the intention of the framers of the statute when its words were obscure or doubtful. Surprisingly, he took the view that even where the wording of the legislation was clear it should be ignored if it conflicted with the makers' intention. He declared that the intention of the legislature 'ought to be followed... in the construction of a statute, although such construction seems contrary to the letter of the statute.'¹⁷ Justice Spencer, in disagreeing with Thompson, handed down an approach to statutory interpretation which would have had more appeal to lawyers advising clients on the import of legislation. He asserted

¹⁶ This data has been extracted from tables in Alfred Billings Street, *The Council of Revision of the State of New York: Its History, a History of the Courts with which its Members were Connected, Biographical Sketches of its Members, and Its Vetoes* (Albany: William Gould, 1859).

¹⁷ *The People v. The Utica Insurance Co.*, 15 Johnson Reports, 380-381.

that ‘Courts of law cannot consider the motives which may have influenced the legislature, or their intentions, any further than they are manifested by the statute itself.’¹⁸ Thompson’s attitude to statutory interpretation in *Utica* owed more to politics than the law.

Where the wording of a statute coincided with legislative intent, Thompson interpreted the legislation strictly. This he did in *Tillman v. Lansing* (1809) when construing an act of 1801 allowing debtors the liberty of the jail. This device avoided keeping the debtor in a cell and permitted him the freedom of the jail walls so that he could conduct some business in an attempt to repay his debts. A kindly sheriff permitted the debtor to attend church each Sunday outside the jail walls. Thompson ruled against the sheriff in an action against him by creditors for permitting the debtor to ‘escape’ (even though he had not escaped) because the debtor’s voluntary return after each service was not permitted by the statute.¹⁹ Roper uses *Tillman* as an example of what he described as ‘New York Supreme Court...hard law.’²⁰ By ‘hard law’ he means handing down justice in a manner in which the strict letter of the law was paramount to the apparent justice of the case. The state reports reveal several opinions supporting this analysis. Thus in Thompson’s first reported state opinion, *Henderson v. Brown* (1803), he held personally liable a revenue collector who had levied execution on goods in a theatre which was mistakenly designated as a dwelling-house on a list provided by his superiors. Fortunately for the collector, Justice Livingston writing for the majority held that he should not be held responsible for the mistakes of his superiors.²¹

¹⁸ *Ibid.* 394.

¹⁹ *Tillman v. Lansing*, 4 Johnson Reports, 45.

²⁰ Roper, *supra*, 50.

²¹ *Henderson v. Brown*, Caines’ Reports, vol. 1, 92, May 1803.

Undeterred, Thompson tried again. This time in *Walker v. Swartout* (1815), Thompson held an army quarter-master general personally liable for work done for the army by boatmen simply because he had said, ‘My word is sufficient. I will pay you when the work is done.’ Happily for the officer, the majority of the court disagreed, preferring the view taken by Chief Justice Marshall in *Hodgson v. Dexter* that when a public officer acted in the line of his duty and by legal authority, his contracts were public and not personal.²² Marshall had observed in *Hodgson* that no prudent man would consent to become a public agent if he was to be held personally liable on a public contract.²³

Thompson managed to carry the court with him, in *Gill v. Brown* (1815), holding an army quartermaster personally liable for the cost of hiring a schooner solely for government use simply because he did not make it clear that he was merely an agent of the federal government.²⁴ Thompson’s unwillingness to protect public officials even when they acted in good faith was further demonstrated by his opinion for the Supreme Court in *Imlay v. Sands* (1804) where a collector seized the plaintiff’s brig and cargo for an alleged breach of the non-intercourse laws. The seizure was confirmed by the state district judge, only later to be reversed by the state circuit judge. Thompson acknowledged that the officer’s actions were bona fide and according to his best judgment, and it appeared that he should be protected from personal liability, but held that the Court was bound to ‘pronounce the law as we find it and leave cases of hardship to legislative provision.’²⁵ This restrictive approach was inconsistent with his general attitude towards encouraging commerce.

²² *Walker v. Swartout*, Johnson’s Reports. Vol. 12, 445. October 1815.

²³ *Hodgson v. Dexter*, 5 U.S. 345, 363 (1803).

²⁴ *Gill v. Brown*, Johnson’s Reports. Vol. 12. p. 386. October 1815.

²⁵ *Imlay v. Sands*, Caine’s Reports. Vol. 1 p. 572. February 1804.

An appreciable amount of business was carried on between the citizen and officials on behalf of local and national governments which required officials to focus on the terms of the contract and not to worry about the possibility of personal liability.

Thompson's and the New York court's 'hard' case law was of little help to purchasers of goods which were not up to standard unless there was fraud or an express warranty as to fitness. This left the unfortunate buyer facing the maxim 'caveat emptor.' An extreme case was that of *Seixas v. Woods* (1804) in which the plaintiff bought wood described in an advertisement as braziletto. He was supplied with the much less valuable peacham wood. Justices Thompson and Kent, with Chief Justice Lewis dissenting, reversed the jury's verdict in favour of the plaintiff, holding that in the absence of fraud or an express warranty, the plaintiff failed. It is difficult to understand why the court did not consider the advertisement or the bill of parcels accompanying the wood describing it as braziletto as an express warranty. In effect the Court placed on purchasers the burden of examining the goods before finalizing the contract.²⁶ The problem with that decision was that it put the purchaser at risk of receiving inferior quality goods when it was often impracticable to examine the merchandise because of the distances involved in travelling to inspect. It also was contrary to the general trend of the courts to promote commercial activity by ensuring that purchasers actually received the goods for which they had contracted. In this respect the decision lagged behind economic change and purported to impose face to face contractual relationships when often inspection was not possible because merchants were trading very much at arms-length when deals had to be effected quickly or be lost whilst, for example, a New York buyer

²⁶ *Seixas v. Woods*, 2 Caines Reports, 48.

spending time arranging for an agent to inspect the sellers goods in New Orleans. A purchaser who bought braziletto should not have been obliged to accept some other inferior product.

Despite the occasional unfathomable opinion, Thompson believed that that the court should promote commercial life by ensuring that merchants knew clearly the basis on which contractual rights would be protected. His general approach was that all contracts were to be construed according to the law of the place where the contract was made and any contract which offended common law or violated the policy or spirit of a statute would be void ab initio.²⁷ In his first reported state opinion, *Carpenter v. Butterfield* (1802), he held that it was not permissible, after the plaintiff had sued the defendant for debt, for the defendant to purchase a promissory note from a third party payable by the plaintiff in order to set it off against the plaintiff's claim. Thompson took the view that to allow such a ploy 'would embarrass the circulation of this species of paper,' as it would make it unsafe for a creditor to sue if he had paper outstanding against him.²⁸ Furthermore, in *Mumford v. M'Pherson* (1806) he held inadmissible a parol warranty that a vessel was copper bottomed where the written contract was silent on the issue. He considered it unsafe to allow a contract to rest partly in writing and partly in parol. His reasoning was clear. The parties must ensure that all material terms were reduced to writing, otherwise the outcome of any action on the contract would be difficult to predict.²⁹ The promissory note case of *Tittle v. Beebee* (1811) is typical of Thompson's opinions protecting the rights of honest men of business when he observed, 'It has been repeatedly ruled in this court, that we will recognize and protect the rights of an

²⁷ *Smith v. Smith*, 2 Johnson's Reports, 241 (1807).

²⁸ *Carpenter v. Butterfield*, Johnson's Reports, 1799- 1803. vol. 3. 145. July 1802.

²⁹ *Mumford v. M'Pherson*. Johnson's Reports, 1806-1823. vol. 1. 417. August 1806.

assignee of a chose in action. (e.g. the right to enforce payment of a debt).³⁰ Bills of exchange and promissory notes were crucial to the smooth running of commercial life and the court had to ensure, if confidence was to remain in these documents, that the holder in due course would have his rights enforced.

Crucial to any system of justice, whether it be at state or federal level, was the speedy resolution of disputes as all too often justice delayed was justice denied. Thompson was aware of the need to simplify legal principles to achieve that object. He demonstrated this in the marine insurance case of *Stevens v. Columbian Insurance Company* (1805) when he had to decide whether on the total loss of a vessel the gross or net amount of freight was recoverable. He held for what he considered to be the straightforward gross amount which was ‘equal, simple, and easily ascertained.’ The net amount, on the other hand, would lead to much litigation and uncertainty as to the deductions to be made such as wages and provisions had the vessel arrived safely in port.³¹

His wish for certainty in the developing law and, wherever possible, the preservation of existing rights to property was illustrated by the admiralty case of *Grant & Swift v. M’Lachlin* (1809). In that case a vessel illegally captured by the French was taken to a Spanish port and left to rot. The Defendants paid \$50 for her at auction, and having spent \$2000 on repairs sailed her back to New York where the original owners claimed her back. Thompson had no hesitation in holding that the sale by the Spanish authorities to the Defendants must be recognized if derivative titles were to be safeguarded.³²

³⁰ *Tuttle v. Beebee*, Johnson’s Reports, 1806-1823. vol. 8. 154. May 1811.

³¹ *Stevens v. Columbian Insurance Company*, Caine’s Reports, vol. 3, 46. May 1805.

³² *Grant & Swift v. M’Lachlin*, Johnson’s Reports, 1806-1823, 39. February 1809.

The juries in state cases, just as in federal circuit courts, were the cornerstone of the developing legal system and their verdicts were supported by justices wherever possible. This is shown by Thompson's refusal of a new trial in the marine insurance case of *Barnewell v. Church* (1803) when he observed to counsel, 'These points were decided by a respectable jury of merchants.' The remark also gives an insight into the quality of juries, at least in commercial cases.³³ However, Thompson, like Livingston, was prepared to reverse a jury's verdict when he believed it was plainly wrong. Thus in *McConnell v. Hampton* (1815) he ordered a new trial in a case where a jury had awarded \$9,000 damages to a private citizen who had been wrongfully arrested and detained for five days by an army officer with threats to court martial and hang him as a spy. Thompson thought that the jury's passions were so inflamed as to mislead their judgments on the amount of damages.³⁴ Whereas, in *Borden v. Fitch* (1818) a jury had awarded \$5,000 to the plaintiff when the defendant had enticed the plaintiff's daughter away by falsely representing that his wife had died and he was unmarried. Thompson thought the award was high but refused to intervene.³⁵ Two apparently conflicting approaches are explained by the aggravating features of each case. In *McConnell* it was accepted that the officer had acted under an honest although mistaken opinion that he had the right to try the plaintiff on a charge for treason, whereas, in *Borden*, the Defendant had 'debauched' the plaintiff's daughter by falsely representing that his former wife was dead. In *McConnell*, Thompson underlined his support of the jury system by stressing that applications to set aside jury awards should be looked at with caution and declaring that he would do so only where the damages were

³³ *Barnewell v. Church*, Caine's Reports. vol.1, 230. August 1803.

³⁴ *McConnell v. Hampton*, Johnson's Reports, vol. 12, 235. May 1815.

³⁵ *Borden v. Fitch*, Johnson's Reports, vol. 15, 139. January 1818.

outrageous or manifestly exceeded the injury sustained. Overturning a jury's award of damages is a difficult area because it involves a judge usurping the function of a jury to order a new trial. The perennial problem is where the line is to be drawn. Justice Van Ness by his dissent did not feel the jury *McConnell* had awarded a manifestly excessive sum.

Throughout the whole period of Thompson's sixteen year tenure the state court looked for guidance to past state supreme court authorities which, of course, were readily retrieved because of the excellent system of law reporting in place in New York. It also relied heavily on English authorities and there are very few opinions reported in Caine and Johnson without favourable references to Lords Mansfield, Holt, Ellenborough, Kenyon and Sir William Blackstone. Blackstone is cited so often as his four volume *Commentaries on the Laws of England*, first published in 1764, quickly became required reading for every colonial lawyer and an American edition, which included United States cases, was first published by St. George Tucker in 1803.³⁶ Tucker's version was based on his lectures at the College of William and Mary where John Marshall and Bushrod Washington had attended to hear the law lectures of George Wythe. The frequent references to Blackstone in New York State Supreme Court reports and the United States Supreme Court reports support the contention of MacGill and Newmyer that his *Commentaries* did more to shape American legal education and thought than any other single work.³⁷

³⁶ St. George Tucker, *Blackstone's Commentaries: With Reference to The Constitution and Laws, of the Federal Government of the United States and of the Commonwealth of Virginia* (Philadelphia: William Young Birch, and Abraham Small, 1803). Lawbook Exchange reprint, 2011).

³⁷ Hugh C. MacGill and R. Kent Newmyer, 'Legal Education and Legal Thought, 1790-1920' in Michael Grossberg and Christopher Tomlins, *The Cambridge History of Law in America*. Vol II. (New York: Cambridge University Press, 2008). 40.

Novel points arose or conflicting opinions required resolution for which Blackstone and others had no answer, and the court had to make the first ruling as occurred in *Foot v. Tracy* (1806) where the court had to decide whether in a libel action the defendant could give general evidence of the plaintiff's character. Thompson observed that counsel had been 'unable to furnish us with much aid from the decided cases and our practice on circuit has not been uniform, We are left, therefore, pretty much at large to establish such a rule as will be most just.'³⁸

Justice Thompson's judicial experience at the date of his appointment to the United States Supreme Court was far greater than that of Justice Livingston. Although Thompson delivered only 250 opinions during his 16 years in New York he will have heard the arguments and the court's opinions in almost 4,500 hearings during that period as opposed to Justice Livingston's 1000 cases in 4 years. Whilst Livingston's judicial experience upon appointment to the Court may properly be described as extensive, Thompson as both associate and chief justice had had a far superior grounding as a judge than any justice who sat on the Marshall Court. He was, therefore, admirably qualified to take his place on the nation's highest court.

His sixteen year tenure as an Associate and later Chief Justice in New York was characterized by a determination to preserve property rights and to promote commerce by formulating principles of contract law and practice, and to assure merchants that rights and obligations arising under bills of exchange and promissory notes would be enforced by the court. His rigid adherence to precedent which he accepted occasionally might result in injustice and his willingness to find officials personally liable when acting for state and national government give the impression

³⁸ *Foot v. Tracy*, Johnson. Vol. 1, 46. February 1806.

of an unsympathetic tribunal; very much at odds with his later efforts on the Supreme Court to protect vulnerable minorities. There is a tension apparent between his function as a judge and as a politician demonstrated by a refusal to strike down state legislation and an insistence on looking beyond the clear wording of an Act to seek the political intent of its framers.

Contractual Obligations on the Second Circuit and on the Court

Of Thompson's seventy-seven federal circuit opinions reported in Elijah Paine's casebook and included in the *Federal Cases*, only fifty-five are dated before 1835. As Thompson sat until 1843, it is not possible to confirm that the remaining undated opinions were delivered during the life of the Marshall Court. Where it was not possible to discern from the body of the opinion an approximate date, the opinion has been disregarded. Consequently, there are only fifty-five reported cases which definitely fall within the period under review, which means that it is possible to present only an outline of Thompson's circuit jurisprudence. However, that deficiency is alleviated to an extent by the knowledge of the justice's considerable contract law experience on the New York Supreme Court underpinned by a knowledge of state supreme court opinions as there was no appreciable shift in approach from state to federal circuit court. Thompson continued to promote trade and was yet another justice who realized the need to protect the position of vulnerable seamen. His no-nonsense approach to the resolution of disputes and his firm handling of jury problems are evident from his circuit opinions.

Land disputes, commercial law and maritime cases account for most of the Thompson's reported circuit opinions. His commercial law opinions cover the fields

of contract, partnership, bankruptcy and bills of exchange. Thompson's enthusiasm to promote trade and encourage business enterprise was echoed in his federal circuit court opinions. Thus in *Six Hundred and Fifty-One Chests of Tea v. United States* (1826), he reversed the district judge's forfeiture order upon a breach of payment of the correct amount of customs duties, ruling that forfeiture was appropriate only where there had been fraud, misconduct or negligence. He believed that care should be taken not to shackle trade or check the industry and enterprise of the merchant by penalizing him for genuine mistakes.³⁹ His opinion in *United States v. Hatch* (1824) advanced maritime trade by ordering the forfeiture of a bond given by the master of a vessel because he had left his crew behind after a foreign voyage. Thompson praised the legislation which required such a bond and which was designed to guard against seaman being abandoned abroad. He observed that 'our national strength depended upon it.'⁴⁰

Thompson's protection of seamen extended to ensuring that they were remunerated for their efforts and not at the mercy of unscrupulous masters or owners. In *The Elizabeth v. Rickers et al* (1831) he held that the punishment of seamen by the master after absence without leave, and continuing them in his employ, was a waiver of any claim to forfeiture of wages.⁴¹ Although in the previous year in *The Cadmus v. Matthews et al.* Thompson had held against the seamen for deserting the ship for trivial reasons, he believed that the Court should watch over and protect their rights because they were, 'generally ignorant and improvident and, probably very often signing the ship's articles without knowing what they contain.'⁴²

³⁹ *Six Hundred and Fifty-One Chests of Tea v. United States*, 27 F. Cas. 253 (New York, April 1826).

⁴⁰ *United States v. Hatch*, 26 F. Cas. 220 (New York, April 1824).

⁴¹ *The Elizabeth v. Rickers et al.* 8 F. Cas. 470 (New York, December 1831).

⁴² *The Cadmus v. Matthews et al.*, F. Cas. 977 (New York, December 1830).

Thompson displayed a pragmatic approach to the preservation of long-standing titles to land. In *Barker v. Jackson* (1826) a New York Act of 1797, which appointed commissioners to settle land disputes, had been sanctioned by state courts for thirty years, yet, the district judge held the act unconstitutional. In the report of the appeal to the circuit court no reasons are given for the district judge's holding which, if undisturbed, would have resulted in the overturning of a large number of titles held by soldiers for military service. Thompson overruled the district judge and his holding is a further demonstration of a common sense approach based very much on the reality of the situation and the preservation of the status quo. It was the solution of a politician. Had he held otherwise it would have thrown into confusion many titles to military bounty land.⁴³

Thompson also encouraged tenants to take care of their holdings in *Albee v. May* (1834) by holding constitutional a state act of 1820 permitting the recovery of the value of improvements. He took the view that an ex post facto law was unconstitutional only if it was penal or criminal in nature.⁴⁴ He also believed in attempting to achieve, wherever possible, the intention of a title deed, as in *Jackson v. Sprague* (1825), where the boundaries described in a deed were inconsistent with each other, Thompson did not avoid the document. He resolved the case by accepting those boundaries which best served the prevailing intention set out in the deed. In other words, he was a judge who sought solutions rather than taking technical points which defeated the parties' wishes.⁴⁵

His opinions on procedural points reveal a confident and very practical approach to the disposal of court business. This was particularly so in discharging

⁴³ *Barker v. Jackson*, 2 F. Cas. 811 (New York, October 1826).

⁴⁴ *Albee v. May*, 1 F. Cas. 134 (Vermont, May 1834).

⁴⁵ *Jackson v. Sprague*, 13 F. Cas. 253 (New York, September 1825).

juries unable to agree. He was not one for keeping a jury out for long periods if there was no possibility of agreement. In *United States v. Perez* (1823), an allegation of piracy, Thompson discharged the jury against the wishes of the district judge when the jury had retired for only four hours. He rejected the argument that juries should be discharged only for reasons of exhaustion, intoxication or mental illness. The Court affirmed his view on a certificate of division of opinion.⁴⁶ Similarly in *Cochrane v. Swartout* (1834) he discharged a jury after only three hours when they could not agree on whether coke was coal and therefore liable to duty.⁴⁷ In *Brewster v. Gelston* (1825), an action by an informer to recover part of forfeited goods, the jury returned a verdict which Thompson set aside and ordered a new trial. He made it plain that where a verdict was so obviously and palpably against the evidence, the judge had a duty not to permit it to stand.⁴⁸ This was a confirmation of his view on the state supreme court of the fallibility of juries.

Thompson's practical approach was again shown by his opinion in *Griswold v. Hill* (1825). Under the common law the death of a party abated the suit. However, adopting the English chancery practice, Thompson overcame the problem by predating the judgment to the day before the defendant's death.⁴⁹ He was a judge who liked to get to the heart of a case and disliked unnecessarily lengthy pleadings. In *United States v. Williams* (1826) when reversing the district judge and ordering a new trial, he complained that the records coming from the Northern District Court of New York were 'vexatiously voluminous and...an abuse of pleading.' He requested the district court to reduce the number of pleas in each appeal.⁵⁰ This common sense

⁴⁶ *United States v. Perez*, 27 F. Cas. 504 (New York, September 1823)

⁴⁷ *Cochrane v. Swartout*, 5 F. Cas. 1144 (New York, October 31, 1834).

⁴⁸ *Brewster v. Gelston*, 4 F. Cas. 82 (New York, April 1825).

⁴⁹ *Griswold v. Hill*, 11 F. Cas. 60 (New York, September 1825).

⁵⁰ *United States v. Williams*, 28 F. Cas. 608 (New York, April 1826).

problem solving approach which eschewed technicalities and sought solutions was an ideal model for the efficient despatch of federal court business.

There is just one reported circuit opinion of Justice Thompson which reveals the importance to him of achieving cross circuit consistency. In *United States v. Sturges et al.* (1826), Thompson held that the Secretary of State's discharge from imprisonment of a person indebted to the United States did not discharge him or his sureties from their obligations to pay the outstanding debt. In reaching this conclusion, Thompson followed a circuit opinion of Justice Story which was directly on the point and observed that it was crucial that there should be uniformity of decisions in the construction of statutes. He noted that Justice Story's opinion had not been reviewed by the Supreme Court and stated that if the instant case was appealed there would be an opinion binding upon all United States circuit and district courts.⁵¹ Thompson's observation reveals not only his view of the importance to the citizen and his lawyer of being able to make a reasonably accurate prediction of an action's success, but also the esteem in which he held Justice Story's opinions.

On the New York Supreme Court Thompson was one of five justices. By the time of his first sitting on the United States Supreme Court in Washington in 1824, he was one of seven.⁵² However, he was no ordinary newcomer. His expertise and confidence were high after sixteen year as a judge of New York State. He was well qualified to contribute to the discussions and his voice would be listened to with

⁵¹ *United States v. Sturges*, 27 F. Cas. 1358 (New York, April 1826). Justice Story's circuit opinion was in the case of *Hunt v. United States*. 12. F. Cas. 948 (Massachusetts, May 1812).

⁵² The Judiciary Act of 1789 set the number of justices at six. The short lived Judiciary Act of 1801 reduced the number to five and the Act of 1807 increased the bench to seven justices.

respect. His four years as New York chief justice and his political experience taught him the necessary man management skills and the benefits of group harmony.

During his years on the Marshall Court Thompson delivered 59 opinions of the Court. He sat for 8 years after Marshall's death, contributing a number of significant opinions whilst a member of the Taney Supreme Court. The majority of Thompson's opinions of the Court mirrored his earlier judicial experience of commercial law and land disputes. There are thirteen commercial and ten land dispute opinions reported. The commercial cases included negotiable instruments, partnership and general contract disputes. Thompson applied his favoured maxim of *caveat emptor* in *The Monte Allegro* (1824) when holding that neither the owner nor the marshal selling tobacco under a forced sale were liable for the inferior quality of the tobacco, as the owner had no control over the sale and the marshal had no authority to warrant the goods. It was for the buyer to inspect and satisfy himself on quality before the purchase.⁵³

Thompson's particular expertise lay in the regulation of rules facilitating commerce through the use of promissory notes and bills of exchange and he authored nine opinions setting out clear rules for merchants to follow. In *Renner v. The Bank of Columbia*, (1824) Thompson upheld the banks' practice to demand payment of a note discounted by it up to the fourth day after the time specified in the original note.⁵⁴ Banks often purchased the amount due under a promissory note at a discounted rate. Although he received a lesser sum, the merchant was saved a longer wait for the full amount and improved his cash flow. Further, in *Bank of Columbia v. Lawrence* (1828) Thompson set out rules of service of notices of non-payment of

⁵³ *The Monte Allegro*, 22 U.S. (9 Wheat.) 616 (1824). See the same principle applied at state level in the 'braziletto wood' case of *Seixas v. Woods*, 2 Caines Reports, 48.

⁵⁴ *Renner v. Bank of Columbia*, 22. U.S. 581 (1824).

notes as ‘it was important for the safety of holders of commercial paper.’ In that case the Court reversed the circuit court and held that leaving the notice at the post office in Georgetown close to the defendant’s home was good service.⁵⁵ In *Boyce & Henry v. Edwards* (1830) Thompson held that there must be clear evidence that a bill had been accepted. Further guidance was given in *Bank of Alexandria v. Swann*, 34 U.S. 33 (1835) when Thompson held that notice of dishonour should be given with reasonable diligence and a small difference in the description of the amount owed, particularly when there was only one note subsisting between the parties was not fatal to the claim.⁵⁶ Thompson simplified an emerging system of credits so that traders knew their rights and obligations.

Whilst an analysis of Thompson’s opinions are useful in ascertaining his views on states’ rights and the promotion of commerce, they also give an insight into how circuit experience was put to use in the full Court. *United States v. Morris* (1825) is a case in point. Thompson wrote the majority opinion absolving a marshal from liability who had levied execution but had handed the proceeds to the debtor. He had done so because the Secretary of the Treasury had exercised his power to remit a forfeiture or penalty under the revenue laws at any time after judgment and before monies were handed over to the collector. As the remission was in time the marshal’s actions were justified. The case is noteworthy, not because of the Court’s opinion but because of remarks made by Justice Johnson during his concurring opinion. He observed that he had considered this problem repeatedly on his circuit and he had reached his expressed view more than twelve years before. Such remarks were rarely expressed when actually delivering an opinion but it is likely that in

⁵⁵ *Bank of Columbia v. Lawrence*, 26 U.S. (1 Pet.) 578 (1828).

⁵⁶ *Bank of Alexandria v. Swann*, 34 U.S.

conference after argument or during the course of counsel's submissions, a justice would volunteer how he had dealt with the issue on circuit more than once in the past, thereby giving the court the undoubted benefit of circuit court expertise.

State Sovereignty

Perhaps the most difficult question which the courts had to determine from the beginning of the federal justice system was the legal and political relationship between the federal government and the several states. Whilst the Supreme Court consisted of justices allied to the Federalist cause, the Court was united in its construction of the Constitution in favour of federal government supremacy. However, justices, such as Johnson and Thompson nominated by Republican presidents, argued, wherever possible, for the right of states to regulate their own affairs. Their dissents on this issue opened up healthy public debates essential to the democratic process.

Dunne classifies Thompson's state court jurisprudence as 'a states' rights mercantilism tempered with a humanitarian overlay.' Thompson acknowledged the right of the federal government to exercise the powers granted to it by the Constitution but those powers, wherever possible, were to be exercised concurrently by the states, particularly in relation to commerce. The issue faced by Thompson and other justices was where to draw the line between state and federal regulation. Article 1, Section 8 of the Constitution empowered the federal government to control many matters including interstate commerce, laying and collecting certain taxes, coining money, and protecting the rights of authors to their writings. Obvious difficulties relating to state control presented themselves in those cases in which a

party had complied with the requirements of state law but had failed to follow the procedures laid down by federal law. An example of such a problem is to be found in Thompson's dissent in the intellectual property dispute between law reporters in *Wheaton v. Peters* (1834). Henry Wheaton had reported and published twenty five volumes of Supreme Court opinions which he had annotated and included the arguments of counsel. His successor Richard Peters, heavily abridged Wheaton's reports reducing them to six volumes which had a disastrous effect on the sales of Wheaton's reports. Wheaton lost his copyright action essentially because of his failure to protect his work by complying with the provisions of federal copyright statutes. Justice John McLean, for the Court, held that there was no federal copyright common law. Thompson failed to carry the Court with his argument that a state was entitled to protect the intellectual rights of its citizens even though federal statutory protection was in place and that Wheaton should succeed because he had complied with Pennsylvania copyright law.⁵⁷ This is a further example of the Thompson's failure to persuade his colleagues that the states had the right to regulate their own affairs, despite that, by this time, the Chief Justice was the only remaining Federalist on the Court. All six associates had been nominated by presidents for their commitment to Republican values, the most important of which was the states' power of self- government.⁵⁸ It is plain that, Johnson and Thompson apart, the Republican principles held by the justices faced a twofold challenge upon appointment to the Court. First, the pressure to present a united front to the nation and second, coping with the Federalist centralization of the Marshall Court with its

⁵⁷ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834).

⁵⁸ Justices Johnson, Todd and Duvall had been nominated by President Jefferson; Story by President James Madison; Thompson by President James Monroe; and McLean by President Andrew Jackson. See, *The Supreme Court of the United States: Its Beginnings & Its Justices, 1790-1991* (Commission of the Bicentennial of the United States, 1992).

emphasis on the supremacy of federal government and federal law in the preservation of vested property rights and the promotion of commerce. Dunne's reference to Thompson's 'humanitarian overlay' is more difficult to discern because, whilst Thompson attempted to mould the law to favour the interests of African slaves and the Cherokee Nation, his hard line approach to precedent on occasion disregarded the hardship to deserving litigants by sacrificing justice in individual cases for a more certain decision making process.

As an example of 'states' rights mercantilism,' Dunne cites Thompson's opinion in *Livingston v. Van Ingen* (1812) for the New York Court for the Correction of Errors in which he held that the state's grant of a steamboat monopoly on New York waters did not infringe the power entrusted to Congress to regulate commerce.⁵⁹ In that case Thompson was outspoken in his support of states' rights observing that he viewed New York as 'an independent sovereignty not having surrendered any of its constitutional powers to the United States.' He believed that courts should declare legislative acts unconstitutional with 'great caution and circumspection' because those laws had been approved by the Council of Revision which included members of the judiciary.⁶⁰ Twelve years after *Livingston v. Van Ingen*, the United States Supreme Court in *Gibbons v. Ogden* strengthened the power of the federal government by holding that such a monopoly contravened the Constitution. Thompson was denied the opportunity of a powerful dissent as the opinion was handed down shortly before he took his seat on the Court.⁶¹

He was not always so strident over states' rights. He concurred with Chief Justice Kent in denying a writ of *habeas corpus* to a father who wished his young

⁵⁹ *Livingston v. Van Ingen*, 9 Johns. R. 507 (1812).

⁶⁰ *Ibid.* 562-563.

⁶¹ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

son's discharge from the army. Thompson accepted that the state court had no right to intervene, although he thought that there might be cases in which it would be the duty of the state court to act but gave no indication of the circumstances which might provoke intervention. He did concede, however, that questions of jurisdiction between federal and state courts were 'generally nice and delicate subjects,' thereby highlighting the tension between federal and state jurisdictions.⁶²

As a United States Supreme Court justice, Thompson's attitude towards jurisdictional disputes between federal and state courts was influenced by his political and judicial connection with New York over many years and his general states' rights stance. This is demonstrated by his reported circuit opinion in *The Robert Fulton* (1826). The plaintiffs obtained an order in state court for the attachment of a vessel for non-payment of a bill for work done and materials supplied. The owners subsequently attempted to invoke the jurisdiction of the federal court. Thompson held that as there were concurrent jurisdictions the tribunal which first exercised jurisdiction should retain the claim.⁶³ There was no suggestion that the issue should be re-opened by a 'superior' court. He was content that the state court was well able to deal with the matter. In *Ward v. Arrendo* (1825) Thompson laid down strict conditions before a case could be transferred to federal circuit court. One defendant could not compel a co-defendant to transfer against his will and if a transfer was granted and the parties failed to enter appearances in circuit court, the case would be remanded to state court.⁶⁴ Therefore, the transition from state to federal justice, in the early years, had no effect on his states' rights judicial stance.

⁶² *In the Matter of Jeremiah Ferguson, a Soldier in the United States Army*, Johnson, vol. 9, 241. (August 1812).

⁶³ *The Robert Fulton*, 20 F. Cas. 869 (New York, April 1826).

⁶⁴ *Ward v. Arrendo*, 29 F. Cas. 167 (New York, April 1825).

Three cases in 1827 demonstrated Justice Thompson's determination to fight for his views on states' rights. In *Ogden v. Saunders*, Thompson's vote was vital as the Court divided 4-3. He supported the majority view that a New York State insolvency statute which protected the property of debtors in respect of contracts subsequent to the statute did not contravene the contracts clause of the Constitution. The majority accepted that any legislation attempting to affect existing contracts would fall foul of 'impairment of contracts' clause but in respect of future contracts the parties were presumed to know the law. Thompson was not averse to a federal insolvency law but saw no reason why the states should not play a concurrent role in dealing with debtors within a state who were incapable of meeting their obligations.⁶⁵

In *Brown v. Maryland* Thompson dissented from the majority holding that an act of a state legislature requiring all importers of foreign goods whilst still in the original packaging to pay for a licence or suffer penalties in default was unconstitutional. He observed that at the founding of the Union the states had a sovereign power to tax imports and that the Constitution had not extinguished that right.⁶⁶ He was alone in that view. His opening remarks reveal the general desire of the Court to present a united front to the world. That a justice regretted dissenting was a sentiment generally expressed. However, Thompson went further by admitting that had this not been a case of constitutional importance, he would have refrained from dissent even though he did not accept the majority view. Thompson concluded his states' rights analysis for 1827 in the case of *Mason v. Haile* an action for breach of a bond securing a debtor's detention in prison. Thompson, for the Court, held that

⁶⁵ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

⁶⁶ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

there was no liability under the bond as the Rhode Island legislature had accepted the debtor's petition that he be discharged from prison. State legislatures had the power to abolish imprisonment for debt. There was, therefore, no unlawful escape and no liability under the bond. Justice Washington dissented because he had consistently set his face against state legislation which purported to interfere with contracts retrospectively.⁶⁷

When Thompson arrived on the Court, the Chief Justice had begun to delegate more opinions to his associate justices. However, despite the considerable expertise Thompson brought to the Marshall Court, the opinions assigned to him were of no great moment and of little constitutional importance.⁶⁸ Thompson went on to write more significant opinions under Chief Justice Roger Taney but, whilst on the Marshall Court, his dissents were more noteworthy than his majority opinions and concurrences. His dissent in *Cherokee Nation v. Georgia*, below, was the most significant.

If there was an expectation of a serious clash between Thompson's states' rights philosophy and the centralism of the Marshall Court, it was not apparent in the early years. Indeed in his first year on the Court in *Osborn v. Bank of the United States* (1824) he agreed with the majority view that a state had no power to tax the Bank of the United States and that any attempt to enforce payment of the tax would be met with a federal injunction. Thompson did not always align himself with local legislation when conflicts arose between state and federal law and in *Bank of United*

⁶⁷ *Mason v. Haile*, 25 U.S. (12. Wheat.) 370 (1827).

⁶⁸ In 1824 Thompson's first full year on the Court, Marshall delivered only 15 of the 41 opinions of the Court, whereas in 1809 he had taken the lion's share by handing down 32 of 46 opinions. As time went on Marshall handed down fewer opinions. Towards the end in 1830 the chief justice delivered less than half of the Court's opinions, 25 out of 56. These figures are taken from the *United States Reports*.

States v. Halstead (1825) a shift in his attitude is evident. A Kentucky law of 1821 prohibited the sale of property taken under execution for less than three quarters of its appraised value. The marshal refused to sell the land because he was offered only \$5 per acre instead of \$26. Thompson authored the Court's opinion which held that the Kentucky law could not bind a sale following the execution of a judgment of a federal court. Thompson argued that an officer of the United States could not be governed by state laws as he acts under the authority of the federal government.⁶⁹ His opinion has in it an element of pragmatism as he expressed the fear that disparate state laws would frustrate orders for sale issuing out of federal courts. He adroitly avoided the issue of whether the Kentucky law was unconstitutional by basing the opinion on the fact that the state law did not expressly cover marshals or federal court executions.⁷⁰

The Cherokee Nation and the African-American Slave

Whilst Thompson was sympathetic to the plight of the Native Americans, he was unable to further their cause in *Jackson v. Porter* (1825). The case concerned the ownership of land which had been purchased from an Indian tribe. Thompson held that, as the Indian tribes had only a right of occupancy of the land, a purchase from them did not confer title.⁷¹ He was obliged to follow the Court's ruling in *Johnson v. M'Intosh* (1823), a case decided before his appointment.⁷² However, he gave his view on Indian titles in a notable dissent, joined in by Justice Story, in

⁶⁹ *United States v. Halstead*, 23 U.S. 51 (1825).

⁷⁰ *Osborn v. The Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824).

⁷¹ *Jackson v. Porter*, 13 F. Cas. 235 (New York, September 1825).

⁷² *Johnson v. M'Intosh*, 12 U.S. 571 (1823), in which Chief Justice Marshall giving the opinion that title to the land was in the European discoverers and the Native Americans were mere tenants. For an in depth analysis of this decision see, Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005).

Cherokee Nation v. Georgia (1831). The majority held that the Court had no jurisdiction to grant an injunction prohibiting Georgia passing laws which deprived the Cherokees of their right of self-government because they were not a foreign state within the meaning of the Constitution and merely a domestic dependent nation.⁷³ That ruling meant that the Supreme Court had no jurisdiction to hear their grievances. Thompson had argued that the Cherokee Nation was a foreign sovereign state entitled to come to the Court for relief. He based his conclusion on the fact that the Cherokees had always been dealt with as such by the United States government both before and after the adoption of the Constitution. His argument was simple but compelling. The Native Americans held the land long before the arrival of European settlers and would have been regarded by the rest of the world as a foreign nation. He failed to see how under the law of nations, the arrival of the Europeans could have altered the position when the tribes continued to live apart from the new arrivals and had been permitted the right of self-government, particularly as they had never been conquered and all wars had been concluded by peace treaties.⁷⁴

Worcester v. Georgia (1832) was a different proposition and the Court was able to assert jurisdiction on the ground that the missionary, Samuel Worcester, was a United States citizen. He had been imprisoned by a Georgia court for refusing to obtain a state licence permitting him to be on Cherokee lands. The Court upheld the laws and treaties of the Cherokees against Georgia enactments which included laws abrogating all Cherokee laws, abolishing their government, and confiscating land for the benefit of Georgia whites. Chief Justice Marshall, citing the provisions of 1802 Act regulating trade and intercourse with the Indian tribes, declared that the federal

⁷³ *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831).

⁷⁴ *Ibid*, 80.

government, and not the states, had authority over Native American affairs. His reasoning followed closely the substance of Justice Thompson's dissent in *Cherokee Nation v. Georgia*.⁷⁵ In reaching his conclusion in *Worcester*, Marshall adopted the research carried out by Thompson in the earlier case and traced the many dealings between the United States and the Cherokees through the Treaties of Hopewell (1785) and Holston (1791). Both treaties had dealt with the Cherokees as a national entity separate from the State of Georgia and explicitly recognized their right to self-government and guaranteed their right of occupation of their lands.⁷⁶ Thompson, in his *Cherokee Nation* dissent, wrote that 'the Cherokee Nation of Indians have, by virtue of these treaties an exclusive right of occupation of the lands in question, and that the United States are bound under their guarantee, to protect the nation in the enjoyment of such occupancy.'⁷⁷ Marshall in *Worcester* used words which were very similar to those earlier uttered by Thompson. Having rehearsed the treaties and statutes, Marshall declared that those laws:

manifestly consider the several Indian Nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

Thompson's dissent in *Cherokee Nation* arose from his refusal to condone Georgia's oppression of the Cherokees. He based his view on the fact that the Article 3, Section 2 of the Constitution gave the Court jurisdiction because the Cherokees had been treated by the United States as a foreign nation. Whilst his agreement with the majority view in *Worcester*, at first sight, seemed to contradict his long held view of a state's right to control its internal affairs, the Court supported the Cherokee position on the ground that the Constitution expressly gave to the

⁷⁵ *Worcester v. Georgia*, 31 U.S. (6 Peters) 515 (1832).

⁷⁶ *Ibid.* 556-557.

⁷⁷ *Cherokee Nation v. Georgia*, 30 U.S. 74-75.

federal government, and not to the states, the power to control relations with the Indian tribes.

Whilst Thompson was able in both cases to show publicly his support of the Cherokees, his efforts to alleviate the suffering of the African already a slave within the United States met with little success because his hands were tied by the Constitution and laws of the United States. The problem was quite different and could not be resolved by deciding whether a distinct body of people was a 'foreign' or 'domestic dependent' nation. The African slaves were regarded in law as individual items of 'property' crucial to the economic prosperity of the South. They were not citizens. They had not the 'blessings of liberty' enshrined in the preamble to the Constitution. In fact the Constitution endorsed the ownership of slaves and prolonged the institution by declaring that Congress had no power to prohibit, prior to 1808, the 'migration or importation of such persons as any of the States now existing shall think proper to admit.'⁷⁸ So that there could be no doubt about that prohibition, Article 5 expressly forbade any constitutional amendment to remove ban until 1808.

The outlawing of the slave trade went a long way towards the protection of Africans in their homeland but the situation of the American slave was not finally resolved until the abolition of slavery by the Thirteenth Amendment to the Constitution on December 6, 1865.⁷⁹ It followed, therefore, that a justice sworn to uphold the Constitution and laws of the United States faced an impossible task in attempting to influence federal law to alleviate the position of the African-American.

⁷⁸ Article 1, Section 9, Clause 1.

⁷⁹ The United States Census of 1810 reveals 1,130,781,239,881 slaves out of a total population of 7,239,881. http://thomaslegion.net/african_american_population_in_the_us_total_black_population_in_us.html (accessed 12.07.2014).

Thompson was one justice who did make the effort. Although the surviving reports do not contain any circuit opinion on slavery he may have written, he delivered three such opinions for the Supreme Court.

In *McCutchen v. Marshall* (1834) a testator bequeathed his slaves to his wife and upon her death all slaves of full age were to be freed. Those under 21 were to be inherited by his brother and brother-in-law and were to be freed when they became twenty-one. The Court dealt with the position of two children born after the testator's death and whilst his wife was still alive. Thompson, writing for the Court, was constrained under the terms of the will to hold that the children remained slaves because their mother had not been freed at the dates of their birth.⁸⁰ However, in the remaining two cases, Thompson was able to demonstrate the humanitarian approach to slavery later shown in his circuit opinion in *The Amistad*.⁸¹ In *The Emily and the Caroline* (1824) Thompson held that the offence of preparing a vessel for sail contrary to the Slave Trade Act of 1794 did not require that the vessel should have been completely fitted out and ready for sea. The Court affirmed the forfeiture of the vessel.⁸² This case demonstrates Thompson's determination to enforce strictly the provisions designed to end further attempts to import more slaves and was much easier to achieve whereas the sentiments expressed by Thompson in his opinion for the Court in *Lee v. Lee* (1834) are remarkable given that the freedom of existing slaves was the matter in issue. The Court reversed a holding of the District of Columbia circuit court that slaves had not gained their freedom after having been moved to Washington from their birthplace in Virginia. There was a dispute as to whether they had been hired out but the Court ordered a new trial on the basis of the

⁸⁰ *McCutchen v. Marshall*, 33 U.S. 220 (1834).

⁸¹ *The Amistad*, 40 U.S. 518 (1841).

⁸² *The Emily and The Caroline*, 22 U.S. (9 Wheat.) 381 (1824).

justice's misdirection to the jury. A preliminary objection was made to the Court's jurisdiction and an application was made to introduce affidavits showing that the value of the two slaves was beneath the jurisdictional threshold of \$1,000.

Thompson gave short shrift to the application remarking, 'The matter in dispute is, therefore, the value of their freedom and this is not susceptible of a pecuniary valuation.'⁸³

The most celebrated opinion on slavery delivered by Thompson was his first instance opinion in the *Schooner Amistad*. Although outside the timeline of this research, it is relevant because it is the culmination of Thompson's enlightened anti-slavery views. Africans (Mende) kidnapped from Sierra Leone were being transported by sea from Havana to plantations along the coast of Cuba. The slaves rose up and took command of the vessel, killing the captain and the cook. The ship was later intercepted off Long Island Sound by a United States revenue cutter and the slaves were taken into custody and later charged with murder and piracy. Thompson presiding in the Connecticut circuit court upon findings of fact by the jury, dismissed all of the criminal charges against the slaves, holding that the circuit court had no jurisdiction over crimes alleged to have taken place at sea on a foreign owned vessel. Thompson was not able to order the release of the slaves because they were the subject of a 'property' claim pending in the district court. In January 1840 District Judge Andrew Judson held that the Mende were not slaves and ordered them to be delivered to the President for return to their homes. On appeal to the circuit court, Thompson affirmed the opinion of the district judge. He dismissed the claims of the Spanish government that the Mende were slaves but allowed an appeal to be made to the United States Supreme Court. On the 9 March 1841, the Court, which

⁸³ *Lee v. Lee*, 33 U.S. 44 (1834).

included Thompson, affirmed the opinions of the district and circuit courts ordered the Connecticut circuit court to free the Mende. Thompson as the circuit judge for Connecticut subsequently formally ordered the release of the Mende.⁸⁴

Whilst the opinion of the Supreme Court in *Amistad* was praiseworthy, the justices were merely enforcing existing laws prohibiting the international slave trade. It is important to make the distinction between slavery and the slave trade. When it came to the position of the African already held to slavery in the United States, the justices were constrained by the Constitution and existing federal legislation. Whatever the personal views of justices such as Thompson they could do nothing to ease the suffering of the slave population.

Conclusion

The defining ethos of Justice Thompson's judicial philosophy was the sovereign right of a state to determine its internal affairs. If that goal was beyond reach, he sought to advance, wherever possible, respect for both state and federal jurisdictions. The opinions examined earlier in *Livingston v. Van Ingen*; *Brown v. Maryland*; *Ogden v. Saunders* and his dissent in *Wheaton v. Peters* provide clear support for this guiding principle. Thompson was a very political animal as his desire for the Presidency and his unsuccessful attempt at the governorship of New York demonstrate but those ambitions did not interfere with his judicial duties.

Despite his Republican background Thompson realised that the survival of the Supreme Court depended upon its members presenting a united face to the nation.

⁸⁴ *The United States v. The Schooner Amistad*, 40 U.S. 15 Peters, 518 (1841). The facts of the case are taken from Bruce A. Ragsdale, 'Amistad: The Federal Courts and the Challenge to Slavery,' (Federal Judicial Center, Federal Judicial History Office, 2002).

He toned down the views he expressed in the New York Court for the Correction of Errors case of *Livingston v. Van Ingen* that New York was an independent sovereignty which had never surrendered any of its constitutional powers to the United States. His observation, in the same year in *In the Matter of Jeremiah, a Soldier*, that questions of jurisdiction between federal and state courts were ‘generally nice and delicate subjects,’ revealed that he was capable of moderation..

As the small number of Supreme Court dissents show, he did not set out to disrupt the Marshall Court or undermine its authority. He was prepared to modify his states’ rights views in *Osborn v. Bank of United States* and he also accepted in *Bank of United States v. Halstead* that state laws could not frustrate the implementation of a federal circuit court order. While Dunne rightly points to Thompson as a man prepared to express dissenting views, the cases examined here do not support the view that he led a reaction to Marshall’s ‘federalist centralism.’ Nor do those opinions confirm Hall’s contention that Thompson’s presence on the Court ‘spelled the gradual eclipse of John Marshall’s influence over the course of American law.’ This research favours Abraham’s contention that, whilst Thompson occasionally disagreed with Marshall, he generally adopted the majority view. This was not a huge political transition as the two party system was in its infancy; political allegiances were still fluid and the responsibility of assuming high office carried with it the need to re-consider loyalties and decide upon a course best suited to the nation’s interests.

His unwillingness to strike down state legislation stemmed from his concurrent judicial and legislative roles in New York State. Sitting as a justice and as a reviewer of state legislation on the Council of Revision and clearly conflicted with the concept that good government required to separate the functions of the

judiciary, executive, and the legislature. His constitutionally incompatible functions in New York also led to an approach which sought the intention of the legislature even when the words of the statute were clear.

A firm belief in preserving the status quo and a strict adherence to precedent were elements of Thompson's judicial restraint which preferred consistency to the occasional injustice (*Jackson v. Still*). While he furthered economic growth by settling law in cases such as *Renner v. The Bank of Columbia*, *Bank of Columbia v. Lawrence*, *Boyce & Henry v. Edwards*, and *Bank of Alexandria v. Swann*, enabling merchants to more readily enforce promises made in bills of exchange and promissory notes, his rigid application of the doctrine of *caveat emptor* in *Seixas v. Woods* and in *The Monte Allegro* did little to ensure that a purchaser received full value for money. He made no allowance for trading at arms-length with little opportunity to inspect the goods beforehand. His inflexible interpretation of a statute, as shown in *Tillman v. Lansing*, is another example of the strict letter of the law triumphing over the justice of the case as are his refusals to protect from personal liability public officials acting in good faith. (*Henderson v. Brown*; *Walker v. Swartout*; *Imlay v. Sands*).

The preservation of the status quo is shown by Thompson's reluctance to overturn established land titles, particularly those granted for military service. This rigidity of judicial restraint was to some extent alleviated by his compassionate approach to the troubling issue of slavery and his efforts to alleviate the plight of the Cherokee which revealed a humanitarian overlay which continued after the Marshall era in his handling, on circuit, of the Mende Africans in *The Amistad*.

His attitude towards juries differed from those of Washington and Story. While generally supportive of jury verdicts, Thompson made it clear in *Brewster v. Gelston* that a verdict should not be permitted to stand if the judge believed it to be clearly against the weight of evidence which contrasts with Washington's pride in declaring in *Willis v. Bucher et al.* that he had refused to accept jury verdicts only twice in sixteen years. Thompson was also quick to discharge a jury if he thought they would not be able to agree, despite the custom of discharge in cases of exhaustion, intoxication or mental illness. His robust views on the fallibility of juries was more in line with that of Livingston, from the same New York stable.

Thompson's contribution to United States law during his period on the Marshall Court did not match the expectation one would have of a justice who had the most extensive judicial experience of all of the justices before joining the Court. One would have anticipated a greater volume of opinions and some of significant impact. This is explained, only to a limited extent, by the Chief Justice's practice of reserving to himself the bulk of the Court's opinions and particularly those with a constitutional element. However, by 1823, John Marshall had begun to assign more opinions to associates and the law reports show that Justices Johnson and Story were not slow in coming forward to deliver the Court's opinion on a wide range of issues.

Thompson's place in the development of early United States law is assured by his efforts to ensure that states, whilst far from fully self-governing, had some say in their internal affairs, by his opinions which engendered confidence in commercial activity, and by his endeavours to shape federal law to alleviate the plight of the African and Native American. Hall's description of Thompson as a judge of 'modest ability' whose contribution to the court was 'mostly unremarkable' is inaccurate and uncharitable. Thompson's stand in *Cherokee Nation v. Georgia* alone takes him out

of the category of an also ran. In that dissent he espoused a cause unpopular to the majority of Americans and, in particular, to the State of Georgia and President Andrew Jackson, In order to take this position, he abandoned his states' rights sympathies and roundly condemned the Georgia government for its actions. The opinions considered in this chapter establish Thompson's valuable role in the development of state and federal law at this crucial period of the life of the new Republic.

Conclusion

This research establishes the United States circuit courts as key to the development of the federal court system in the Early Republic and balances the approach of scholars who, when examining the rise in influence of the Supreme Court, have focussed on the impact of John Marshall and the Court's landmark cases. Whilst the Supreme Court's major constitutional opinions were important in settling a body of United States laws, it was left to the justices on circuit, in the early years, to construct a system of federal law which was fair, consistent and effective. The output of the Jay and Ellsworth Courts between 1798 and 1800 was so small as to be of little assistance to the justices riding circuit who, individually and collectively, had to source and fashion American to resolve the nation's criminal and civil litigation. The justices were further hampered by the lack of federal legislation to guide them in their task.

In short, this thesis maintains that a significant factor in the rise in influence of the United States Supreme Court was the shaping of law by the justices on circuit. It follows that the success of the federal court system fed up from the 'inferior' circuit courts rather than down from the Supreme Court to the lower levels. An examination of the neglected role of the federal circuit courts and a consideration of a large body of circuit reports has enabled one to look through a little used lens to see an evolving nation; the cases tried in those courts indicating momentous issues facing the new democracy; and the ways in which the justices met those events and constructed an essential foundation of stable government.

It was an arduous task; much more so than sitting together in the comparative comfort of a courtroom in the nation's capital and during the evenings in the same reasonable lodgings. Aside from the great physical hardship of travelling thousands

of miles each year along poor roads, there was the emotional distress of separation from family and friends for months at a time and it is, therefore, not surprising that some justices refused the appointment or resigned after short periods of circuit duty. It did not end there. Once they reached their circuit destinations they had to dispense justice often without the benefit of a law library. They also had to contend with the absence of written state statutes, no law reporters and case citations which often failed fully to record the issues and arguments. Despite these considerable problems, certainly by 1835, they had produced a system of federal justice eminently fit for purpose and it all began by their exercise of the circuit court jurisdiction.

The reports show that by the sheer volume of work circuit sitting enabled the justices to hone skills acquired from practice at the Bar or as a judge of a state supreme court. It was also an ideal way of familiarizing themselves with branches of the law with which they had little experience. Day to day exposure to all manner of legal issues endowed them with the essential expertise to conduct their business in the Supreme Court more effectively and with greater self-assurance. It also made them acutely aware when sitting on appeals of the problems encountered by justices across the circuits. This thesis argues that the circuit experience underpinned the rise of the Supreme Court from a position of weakness to an authoritative and effective department of the federal government. Further, that the expertise and confidence gained on circuit was a factor in the federal judiciary's ability to withstand political attacks by Republican opponents led by President Jefferson during the vulnerable formative years of the Marshall Court.

This thesis contributes to our knowledge of how the law was shaped in those early years through the depth of its inquiry into the legal issues facing the justices on circuit. A total of 1975 Supreme Court, circuit court, and state court opinions handed

down by Justices Washington, Livingston, Story and Thompson have been examined to identify the nature of the work undertaken on circuit, analyse how the justices decided the legal issues, assess the expertise gained, and evaluate the use to which skills acquired on circuit featured in their Supreme Court contributions. The research has also shown how federal justice was received on circuit; from the acceptance with acclamation by the grand juries to the charges presented by the early justices in Pennsylvania, Delaware, Massachusetts, and New Hampshire to the outright rejection by the Augusta grand jury in 1791 of the need for federal justice and of federal government interference in state affairs.¹

This examination of the nature of the litigation before the justices and the way in which each justice faced the particular problems of his circuit has revealed not just constitutional attitudes but also general jurisprudence as the circuit reports cover virtually every point of law resolving issues of national importance to opinions of interest merely to the parties to the case. The reports have also disclosed the determination of all four justices to uphold existing property rights and promote inter-state and international trade and how Justices Livingston and Thompson laid down definitive guidelines for the conduct of commercial relationships, particularly in respect of negotiable instruments, the essential currency of economic prosperity.

Washington's opinions reflect an approach to stability in the justice system based on the certainty which precedent brings to the law despite the occasional injustice caused by too rigid an application. Story's circuit opinions have shown not only a justice comfortable with all branches of law but also one whose pre-occupation was to import common law principles into criminal and civil law to

¹ Marcus, *Documentary History*, vol. 2, Grand Jury responses, Pennsylvania (45); Delaware (53); Boston (61); New Hampshire (113) and Georgia (224).

supplement the few federal statutes and Supreme Court authorities and in order to clarify American law and make it more readily understood.

A justice's circuit opinion is generally a more reliable indicator of his jurisprudence than his opinion for the Supreme Court. Whilst a justice on circuit sometimes sat with a district judge, the justice's view of the law or facts usually prevailed and the opinion occasionally expressed his personal and political views on the issues before him . This was not always the case with the Supreme Court opinion which often required the compromise of strongly held views for unanimity. Hence Justice Story's assessment that his character as a judge would be more accurately reflected in his circuit rather than his Supreme Court opinions.²

Chapter One, by examining the debates of the Constitutional and Ratification Conventions and the fierce arguments in Congress over the Judiciary Bill 1789, has highlighted the deep divisions between Federalist and Republicans. A common theme running through all debates was the Republicans' fear that a federal judicial system would undermine the authority of state courts and legislatures. They were also afraid that the Republic, under the Federalists, would be modelled on the British monarchy with government by an elite minority. The Federalists were deeply concerned that the United States was under threat of a French style revolution because of widespread popular support within the United States for the French wish for freedom from oppression if not for the means by which they sought to achieve it. The Alien and Sedition Acts of 1798 examined in Chapter One were a knee-jerk reaction by the Federalists to the perceived possibility of civil disobedience. The justices' conduct of the criminal trials of prominent Republicans under legislation

² Letter, Joseph Story to District Judge Hopkinson, February 16, 1840 from the Hopkinson Papers cited in Newmyer, *Joseph Story*, 318.

which criminalized criticism of officers of the federal government left much to be desired. The Sedition Act was a clear infringement of the right to the freedom of speech and of the press guaranteed by the 1791 First Amendment to the Constitution. Justices Paterson and Chase refused to hear arguments as to the constitutionality of the acts and their partisan conduct of the trials denied Republicans facing loss of liberty due process of law guaranteed by the Fifth Amendment. I argue that this controversial legislation produced not only the Virginia and Kentucky Resolutions of 1798 but also adversely affected the standing of the Federalist Party in the country and was a factor in Jefferson's success in the 1800 presidential election.

These deep divisions caused by the emergence of the two political parties added to the burden of the justices on circuit. It meant that those early circuits were both legal and political experiments; legal in the sense of establishing federal justice across the nation and political in order to secure public support for the concept of federal justice and government. The justices' main task was the resolution of criminal cases and civil disputes between individual citizens or a citizen against a state. However, they were expected to, and did, promote the concept of a strong federal government by use of the charge to the grand jury at the commencement of each circuit sitting. Those messages were generally well received but not in those states opposing the very concept of a national government and a federal judiciary. The political element of the grand jury charge is best illustrated by the fact that Chief Justice Jay's charge to a jury in 1793 explaining why the United States refused

to be drawn into European conflicts was later sent to Europe as an explanation for neutrality.³

Such overtly politically motivated grand jury charges in the Court's first decade gradually disappeared with the advent of John Marshall and the emerging concept of an independent judiciary; the justices confining themselves to handing down instructions on aspects of the law relevant to the grand jury's duty to issue presentments (indictments) or to those cases which the petty juries were likely to try during the current session of the court. The falling into disuse of the grand jury charge as a political tool was due, in the first instance, to the justices' fears of further impeachments of state and federal judges by the Republicans and, when that threat had disappeared by 1807, to the fact that the new federal institutions began to gain a general acceptance and there was no need to hammer home the virtues of central government.

Justices Livingston, Story and Thompson, all politically active in the Republican Party before appointment, disappointed their respective nominating presidents by failing vigorously to defend states' rights from federal encroachment. This thesis offers explanations for the justices' pragmatic political shifts. First, whatever political party allegiance had been formed by class and family ties, the justices came from very similar backgrounds and shared the same fundamental values. Justice Washington, the favourite nephew and heir to the President's estate, inherited his uncle's vision of future prosperity and political stability under a strong central authority. Livingston was an active politician who, despite having served as a Federalist in the New York Assembly, supported the opposition and conducted a

³ Gordon S. Wood, *Empire of Liberty*, 412-413.

vigorous campaign which helped carry New York for Thomas Jefferson in the 1800 presidential election. Thompson sought high political office as a member of a Republican administration. Story was a New England Republican whose commitment to the Jeffersonian vision was not as strong as that of the President's Virginian followers. The nation was finding its way, experimenting with democratic government and allegiances were fluid. Political support might waver if expectations were not met or after assuming new responsibilities and Republican nominated justices were not the only people dealing with change as is shown by James Madison's political manoeuvres described in the Introduction to this thesis.

Second, as revealed in Chapter One, the federal bench and Federalist state judges were under constant threat of impeachment by Republicans under the direction of President Jefferson who lost no opportunity to undermine the judiciary privately and publicly. These attacks had the effect of uniting the Supreme Court justices, whatever their political persuasions, against all opponents. The Court at the turn of the nineteenth century was the weakest department of government facing a ruling party which had suspended its sittings for over a year in the Judiciary Act 1802. Not only did Jefferson attack the judiciary in private correspondence at every available opportunity, he also attacked Marshall publicly in his Second Inaugural Address for his conduct of the trial of Aaron Burr for treason. He was the instigator of impeachment against state and federal court judges and connived with Republican supporters to attack the federal judiciary in the Press. One can, therefore, understand why the justices united and felt the need to tread carefully in politically sensitive cases. *Marbury v. Madison* is evidence of a compromise to avoid a direct confrontation with the Jefferson administration. *Stuart v. Laird*, is further proof of compromise when the justices, despite serious privately expressed opposition,

meekly submitted to the re-introduction of circuit riding under the Judiciary Act 1802, refusing to challenge its constitutionality⁴ The Court feared retaliation from a Republican dominated Congress.⁵ The task of developing a federal judicial system was made much more difficult by this constant sniping at the judiciary. Marshall believed that the Court was the final arbiter of the meaning and intent of the Constitution and Jefferson felt strongly that the Court was usurping the function of executive and legislature to undermine state sovereignty.

Third, the convention of the single opinion of the Court had the effect of achieving unanimity through compromise because of the need for unity in the face of a determined opposition, resulting in all members of the Court being more amenable to the general view. The fact that, for the greater part of the Marshall era, the justices conducted their deliberations in the same lodging house in which they all resided during term time made for lasting friendships and facilitated unanimity is apparent from Story's description of judicial conferences. Whilst a justice may still have maintained the same views he held as an advocate or state justice, he was less strident in expressing them through the medium of a dissent. The relaxed and friendly atmosphere of lodging house conferences appears from a conversation Story had with a Harvard graduate in 1826 describing the convivial spirit of the lodgings. Story spoke of the justices' general rule that they would take wine only when it rained. Marshall would make the following request, 'Brother Story, step to the window and see if it does not look like rain.' Story added that if the sun was shining

⁴ *Stuart v. Laird*, 5 U.S. 299 (1803).

⁵ Chief Justice Marshall doubted the constitutionality of Supreme Court Justices sitting as circuit judges and Justice Chase was firmly against it. However Justices Cushing, Paterson, and Washington felt that as it had been the practice for a number of years, it was too late to object. (See letters of the justices between April and June 1802 in Hobson, *Papers of John Marshall*, vol. VI, 108-121). The extremely short opinion handed down by Justice Paterson in *Stuart v. Laird* did not touch upon any constitutional issues and expressly stated that because the justices had been acting as circuit judges for so long, it was an established practice which could not be challenged.

brightly the Chief Justice would sometimes reply, ‘All the better; for our jurisdiction extends over such a large territory that it must be raining somewhere.’⁶

Whilst the justices each held firmly in mind the need for consistency across circuits, they approached the task in different ways. The circuit reports examined in Chapter Two have established that Justice Washington’s judicial philosophy was dominated by the need for a uniformity of law and procedure flowing from strict adherence to the doctrine of legal precedent. He searched English law and state authorities to find grounds for an opinion, expressing anxiety if he was obliged to deliver an opinion devoid of past authority. He believed that a strict following of past decisions was essential to preserving existing land titles and the sanctity of contracts and, if this approach resulted in occasional injustices, it was for government to solve the problem.

Livingston’s attitude towards precedent, as Chapter Three demonstrates, was markedly different. Whilst he believed that precedent was essential for stability, his reported circuit cases show less enthusiasm for the doctrine than those of Washington. Wherever possible Livingston preferred state supreme court opinions to the English authorities, taking pride in the emerging body of United States law. One detects an antipathy for the English authorities. He had less reason than the other justices to admire England because of his capture and imprisonment by the British on the voyage home from Spain in 1782 and the condemnation by the British in 1804 of a vessel with cargo in which he had a heavy financial interest. Livingston, like John Marshall, preferred to found his opinions on general principles of law rather than the culmination of an exhaustive study of past cases.

⁶ Josiah Quincy, *Figures of the Past from the Leaves of Old Journals* (Boston: Roberts Bros., 1883). 189-190.

Whilst on federal circuit Thompson drew heavily on state supreme court authorities of which he had great experience given his sixteen year tenure as a New York Supreme Court Justice. He was more willing than Livingston to import English precedents into the growing body of American law. Story's circuit opinions have revealed a readiness to mine any source of law which would enhance the authority of his decisions. He, therefore, looked to state law, the works of European jurists and had the highest regard for the decisions of English judges and text book writers. His circuit opinions were erudite and reviewed every relevant authority and were, therefore, held in high regard by his brother justices.

Wherever possible, the justices followed the opinions of state supreme courts. Washington was prepared to follow a state opinion even though he was not sure it was correct because of his desire for harmonious federal and state jurisdictional relationships.⁷ Livingston and Thompson were kindly disposed to guidance from that quarter, having sat as state supreme court justices. When Thompson handed down his opinion in the federal circuit court case of *Vermont v. The Society for the Propagation of the Gospel* he cited no fewer than twenty-four New York State Supreme Court opinions.⁸ Story circuit opinions cite numerous state court decisions. His approach arose not only for the sake of comity but also from the perspective of public policy and public interest in avoiding conflicting opinions of federal and state judges.⁹ When delivering the Supreme Court's opinion in *Bell v. Morrison*, Story followed his practice on circuit and declared that the local rules of interpretation of state statutes must be presumed to be founded on a more just and accurate view of

⁷ *Mott v. Morris*, 17 F. Cas. 905 (1808).

⁸ *Vermont v. The Society for the Propagation of the Gospel*, 28 F. Cas. 1155 (1827).

⁹ *United States v. Slade*, 27 F. Cas. 1125 (1820).

the local jurisprudence.¹⁰ He was arguing that state courts and legislatures were best placed to identify and provide solutions to local problems and, therefore, ought to be considered with respect. However, with the advent of an increasing body of federal legislation and Supreme Court authorities, the need to look elsewhere for guidance diminished.

The advent of the professional law reporter made the justice's task much easier but the reports whether at circuit or Supreme Court level, had to be full and accurate. Story emphasized this when writing to the Supreme Court law reporter, Henry Wheaton, who had failed to record that Livingston and Story had dissented in *Mutual Assurance Society v. Taylor*. Story was concerned lest the case be later treated as a unanimous holding.¹¹

The justices' letters, and particularly those of Joseph Story, reveal that when the justices met in Washington, either on the Court or in their lodging house, they conferred and exchanged experiences of particular problems, how they had been resolved, and sought advice on future cases in their circuit lists. They wrote letters seeking advice on unfamiliar topics. The exchange of semi-annual reports between Justices Washington and Story of interesting cases they had decided on their respective circuits is particularly important in the quest for consistency.¹²

A further means of achieving uniformity was the use of the certificate of division of opinion when there was a disagreement between the justice and the district judge as to the applicable law. In this way the circuit court was able to send

¹⁰ *Bell v. Morrison*, 26 U.S. 351 (1828).

¹¹ Letter, Story to Wheaton, August 31, 1816 in W.W. Story, *Life and Letters*, vol. 1, 153.

¹² Letters Bushrod Washington to Joseph Story of June 19, 1821 and December 4, 1821 in Joseph Story Papers. Massachusetts Historical Society, Boston, cited in White, *The Marshall Court and Cultural Change*, 348.

the case to the Supreme Court for a definitive ruling on a troublesome issue which regularly faced the circuit courts. This device was so useful that on occasion the justices feigned disagreement to have the law clarified. Thus, in *De Lovio v. Boit*, Story and District Judge Davis agreed to disagree on the extent of the federal courts' jurisdiction in admiralty matters.¹³ In the event, Story was disappointed because the parties accepted his view and did not take the matter further. Story adopted the same ploy in *Dartmouth College v. Woodward*.¹⁴

A comparison of circuit and Supreme Court opinions has revealed that some justices, because of local issues or the location of their circuit centres, achieved an expertise in certain branches of the law which affected the Chief Justice's opinion assignment practice. Provided a justice's view of a case coincided with that of the majority, the Chief Justice considered him a candidate for authorship of the majority opinion. The opinions of the Court assigned to each justice reveal a great disparity; for example, Justice Story positioned himself as a frequent volunteer for the task whilst Justices Todd and Duvall maintained a very low profile. A factor just as important as a willingness to write was John Marshall's awareness of the special expertise gained by his associates on circuit. That he knew his associates' strengths has been established in his letters to Justices Washington and Story requesting guidance on unfamiliar branches of law.

There is a definite correlation between circuit expertise and opinion assignment practice. The state and federal circuit court opinions of Livingston reveal a preponderance of maritime or commercial opinions. On the Supreme Court, out of a total of thirty-six majority opinions he was asked to write, all but one concerned

¹³ *De Lovio v. Boit*, 7 F. Cas. 441.

¹⁴ *Trustees of Dartmouth College v. Woodward*, 64 New Hamp. 473 (1817).

maritime or commercial law. Thompson's state and federal circuit opinions demonstrate his specialities as commercial and land law. On the Court he was asked to write fifty-nine opinions, thirteen of which concerned commercial disputes and ten involved the disposition of lands. Of the commercial disputes nine covered his practice of setting guidelines for the regulation of promissory notes and bills of exchange. The majority of the remaining opinions related to procedural and jurisdictional issues.

An analysis of Washington's 520 circuit cases shows he sat on 215 admiralty cases and land disputes. On the Supreme Court he handed down eighty opinions of the Court of which thirty-five involved admiralty and wills, far more than any other branch of law he dealt with on the Court. Story presided over many admiralty, land and commercial cases on circuit but admiralty disputes in the busy port of Boston constituted his main source of work. His authority in admiralty cases was reflected in the large number of Supreme Court opinions he was chosen to deliver. Out of a total of 252 admiralty opinions, the Chief Justice reserved 90 to himself which meant that Story wrote 35% of the remainder. It follows, therefore, that circuit expertise was the major factor in deciding who had the Chief Justice's confidence to draw other justices together not just to join in the result but also to persuade them to accept the reasoning behind the holding. The circuit experience meant that the Court's authority was enhanced by a justice writing the opinion who was expert in the relevant branch of law.

In Chapter One I argue that in the early years of the Republic it was not the Supreme Court but the justices, individually and collectively on circuit, who shaped federal law. Whilst the early use of the grand jury charge facilitated the regional acceptance of federal law, the justices still had to contend with the

determined and persistent attacks by President Jefferson and his followers to undermine their efforts, which led in part to the disappearance of the political element of the charge and compromise opinions to avoid confrontation with the executive.

The remaining chapters have examined the day to day workload of a justice on circuit to gain an insight into the events and problems of the Early Republic. Each chapter has also examined the value of circuit experience to the Supreme Court opinion as well as focussing on particular aspects of each justice's jurisprudence and the part his specialities played in shaping United States law. Story's assessment of Washington as 'a good old fashioned Federalist' with 'a cautious mind' who was 'distinguished for his moderation,' has been confirmed on numerous occasions by his circuit court and Supreme Court opinions which also reveal his view that interests of individual states were secondary to those of the nation as a whole. Evidence of his conservative Federalism has also emerged from his preservation of existing property rights and the formulation of rules facilitating interstate and international trade in manufactured goods as the means of achieving economic prosperity as opposed to the Republican desire for national wealth through agrarian self-sufficiency.¹⁵

Despite the occasional injustice resulting from a rigid adherence to the doctrine of precedent, it is generally accepted that a system which enables a reasonably reliable prediction of the outcome of litigation is far preferable to attempting to forecast the whims of particular judges. Counsel in Philadelphia and

¹⁵ Thomas Jefferson, 'Notes on the State of Virginia, Query XIX, The Present State of Manufactures, Commerce, Interior and Exterior Trade, 1787 in Peterson, *Thomas Jefferson: Writings*, 290-291. Jefferson believed that the United States should import manufactured goods from Europe and that Americans should farm as 'those who labour on the land are the chosen people of God.'

Trenton who researched the authorities would be well placed to advise their clients appearing in Washington's circuit courts as to the prospects of success because of his strict application of precedent. The research has also revealed how Washington's view of his own slaves, as items of personal property to be disposed of as and when he saw fit, influenced his judicial stance on slavery when he expressed himself unable to comprehend that removing a slave from one 'owner' to another in a far distant land did not worsen the slave's plight.

Even if Justice Washington had a more enlightened view of slavery it is unlikely he would have made an impression on this troubled issue as the other justices felt constrained by the Constitution and the Fugitive Slave Act 1793 to endorse the status quo. The cases show that the justices rigorously enforced the 1808 prohibition on the international slave trade but apart from freeing a slave who had accompanied his owner to a non-slave state and resided there beyond a permitted period, the justices made no impact whatsoever on the institution of slavery within the United States which was not formally abolished until the 1865 Thirteenth Amendment.¹⁶

Livingston's politics reflected the fluidity of party allegiances in the early Republic as did his approach to the delicate balancing of state sovereignty and the powers of the federal government. His state and federal circuit opinions on commercial law underpinned the status of partnership and inspired confidence in the commercial world by setting out the rights and responsibilities of drawers, indorsees, and payees of bills of exchange and promissory notes, the cornerstone of trade payments. Before Story arrived on the scene, Livingston was the Court's leading

¹⁶ *Prigg v. Pennsylvania*, 41 U.S. 539 (1842); Constitution, Article IV. Section 1, Clause 3.

authority in maritime law dealing mainly with breaches of embargo and forfeiture of vessels for contravening licencing regulations.

Story mastered every branch of law to which he turned his hand but among the most important aspects of his shaping of United States law was his repeated efforts to import English common law into federal law. He was firmly of the view that a common law of federal crime was necessary because of the government's failure to enact laws covering all aspects of criminality on land and at sea.¹⁷ Whilst his efforts on circuit and on the Supreme Court to establish a common law jurisdiction failed in respect of criminal and admiralty matters, he was successful in realizing his ambition when he established in *Swift v. Tyson* a federal common law in commercial disputes in diversity cases where the parties to an action came from different states.¹⁸ He overcame the rejection of his plan for a federal common law of crime by drafting a criminal code which later saw life as the Crimes Act 1825 which set out comprehensively and clearly the federal criminal law then in force.

Thompson's state, federal circuit, and Supreme Court opinions, highlight the pressures facing a justice attempting to balance the powers of the federal government with the right of a state to control its own affairs. His approach stemmed from a lack of separation of powers in New York State where he sat as a judge and also on the Council of Revision where he was tasked with the approval of state legislative bills. Generally unwilling to strike down such legislation, he promoted state sovereignty wherever possible, or at least attempted to achieve concurrent

¹⁷ Letter, Story to Nathaniel Williams August 3, 1813 complaining about the 'deficiencies of our criminal code,' and requesting Williams to put pressure on his representative in Congress and to use the press to remedy the lack of legislative diligence. W.W. Story, *Life and Letters*, vol. 1, 246-247.

¹⁸ *Swift v. Tyson*, 41 U.S. 1 (1842).

powers. However, with so few dissents, he did not fulfil President Monroe's expectations and all too often succumbed to the collegiate unanimity of the Court.

From time to time a public figure will challenge mainstream opinion and speak as the nation's conscience for an oppressed minority, despite determined opposition to such humanitarian views. Justice Thompson was one such person. The federal government, led by President Andrew Jackson, and the State of Georgia were determined to drive the Cherokees from their homeland in Georgia across the Mississippi to the wastelands of Oklahoma. The majority of the nation either agreed with this 'removal' policy or were indifferent to the fate of this the most 'civilized' tribe of Native Americans. Thompson's endeavour to shape federal law to protect minorities is demonstrated by his powerful dissent in favour of the Cherokees in *Cherokee Nation v. Georgia* and constituted the foundation of the Court's enlightened approach towards the Cherokees in the later opinion of *Worcester v. Georgia*.¹⁹ The Cherokee cases are noteworthy not only as evidence of a humanitarian side to Thompson's jurisprudence but also as an example of a justice setting aside his belief in state sovereignty in an attempt to halt a state's oppression of a particularly vulnerable minority group.

In addition to identifying the sources from which federal law was fashioned and highlighting particular aspects of each justice's part in the law's development, the circuit opinions shed light on the way in which the nation was changing in this period and how emerging issues were faced. The opinions have revealed how the circuit justices formulated commercial law in an expanding economy. The opinions of Justices Washington, Story and Thompson have also disclosed how they

¹⁹ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). *Worcester v. Georgia*, 31 U.S. 515 (1832).

promoted an important aspect of trade by protecting the working conditions, pay, health and general well-being of seamen, making it plain that fully manned vessels were essential for interstate and international commerce and for the protection of the Union.²⁰

Challenges to land titles arising from the need to accommodate a rapidly increasing population formed an appreciable part of Washington's circuit docket where the absence of man-made boundaries or failure to survey or register land led to numerous possession actions. The opinions of all four justices reveal a determination to uphold existing property rights in land.²¹

The numerous embargo and non-intercourse circuit court opinions expose the vulnerability of the United States during the period of hostile relations with Britain prior to and during the War of 1812. The cases show how rigorously the justices enforced the trade prohibitions by handing down opinions forfeiting the vessel and cargo of any owner or master who ventured to disregard the regulations. They were obliged by the nature of their office to take such draconian action despite the fact that the legislation had little impact apart on Britain and severely damaged United States trade interests.

The circuit opinions also reveal extremely politically volatile cases which aroused great local public agitation such as Justice Washington's criminal trial of the Pennsylvanian general who, on the orders of his state governor, had by force of arms prevented a United States marshal from serving a federal court writ.²² Washington's consideration of the right of a state to protect its natural resources from outsiders

²⁰ *The George*, 10 F. Cas. 205 (1832). *United States v. Hatch*, 26 F. Cas. 220 (1824).

²¹ *Milligan v. Dickson et al.*, 17 F. Cas. 376 (1817). *Barker v. Jackson*, 2 F. Cas. 811 (1826).

²² *United States v. Bright*, 24 Fed. Cas. 1232 (1809).

also had far reaching consequences.²³ A most troublesome and politically sensitive circuit case was the trial of President Jefferson's former Vice-President Aaron Burr for treason. Chief Justice Marshall presiding declared it the most difficult case he had ever met when he called upon his associates for assistance on the relevant law.²⁴ Whilst some of the work of the justices on circuit was mundane, on occasion they faced issues of national importance which prepared them for duty on the Supreme Court.

This examination of this large number of state, federal circuit, and Supreme Court opinions of four prominent Marshall associate justices reveals many important factors in the development of law in the Early Republic. It has demonstrated the sources from which the justices on circuit established a uniform system of law across the nation to resolve everyday disputes and inspire confidence in the federal court system. The justices' opinions, however, reveal much more than that because they are windows on those crucial events in the nation's history such as its vulnerability to hostile European powers, the expansion of commerce, and the thirst for land to accommodate a rapidly expanding population, one aspect of which was the displacement of the Cherokees. The continued struggle for power between the federal government and the demand of the states to govern their own affairs constantly features in the circuit and Supreme Court law reports.

There have been a number of questions addressed in this thesis which firmly establish its main argument that the federal circuit courts were the foundation of United States law because it was in that jurisdiction that the justices shaped every aspect of federal law and procedure. This thesis has detailed precisely how they

²³ *Corfield v. Coryell*, 6 Fed. Cas. 546 (1823).

²⁴ *United States v. Burr*, 25 F. Cas. 30 (1807). Letter Marshall to Justice Cushing, June 29, 1807, in Hobson, *Papers of John Marshall*, vol. VII, 60-62.

managed that difficult task and the benefit of that experience to the Supreme Court. The day to day work of the circuit court gave the justices the expertise and authority to better perform their duties on the Supreme Court and the confidence to resist those who sought to restrict its powers.

This thesis begins the long overdue process of evaluating the circuit courts' role in the general acceptance of and rise in influence of the United States federal court system. I contend that this examination of the opinions of four prominent Marshall Court associate justices proves that the circuit court was vital to the federal court system because, in those very early years, it was the circuit experience and not the Supreme Court which shaped United States law and prepared each justice for a more informed discharge of his duty on the nation's highest tribunal. These justices found American law a skeleton at the beginning of the nineteenth-century. Their work in the circuit courts, in the early days and later in their duties on the Supreme Court as that tribunal's workload increased, left a fully formed body of federal law to which later generations have added. That structure is still recognizable today and is the legacy of which the circuit work of Washington, Livingston, Story, and Thompson is a crucial and central part.

Bibliography

Primary Sources

Founding Documents

Declaration of Independence 1776
Articles of Confederation 1781
United States Constitution 1788
Kentucky and Virginia Resolutions 1798

Statutes and Treaties.

Paris Peace Treaty 1783
Treaty of Hopewell 1786 (Cherokee Nation)
Judiciary Act 1789
Punishment of Crimes Act 1790
Treaty of Holton 1791 (Cherokee Nation)
Fugitive Slave Act 1793
Judiciary Act 1793
Alien & Sedition Acts 1798
Judiciary Act 1801
Judiciary Act 1802
Embargo Act 1807
Slave Act 1807
Judiciary Act 1891 (Evarts Act)
Judicial Code 1911

Law Reports

United States Reports, 1790-1835.

Federal Cases, 1789-1880, 30 vols. plus index (West Publishing Company, 1894-1897).

Caines, George, *Law Reports of the New York Supreme Court, 1803-1803*, 3 vols. 3rd ed. Revised by William G. Banks (New York: Banks & Bros., Law Publishers, 1883-1885).

Garrison, John (ed.), *First Circuit Reports, 1812-1815*, 5 vols. (Boston: Wells & Lilly, 1815-1817).

Johnson, William, *Law Reports of the New York Supreme Court*, 3 vols., 1799-1803 and 20 vols. 1806-1823 (New York: Banks & Bros., Law Publishers, 1864).

Mason, William P. (ed.), *First Circuit Reports, 1816-1830*, 5 vols. (Boston: Hilliard, Gray, Little & Wilkins, 1842-1845).

Paine, Elijah Jr. (ed.), *Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit: Comprising the Districts of New-York, Connecticut, and Vermont* (New York: R. Donaldson, 1827).

Peters, Richard (ed.), *Reports of Cases Argued and Determined in the Third Circuit: Comprising the Districts of Pennsylvania and New Jersey, 1803-1827*, 3 vols. vol. 1 (Philadelphia: William Fry, 1819; vols. 2 & 3, Philip H. Nicklin, 1827).

Sumner, Charles (ed.), *First Circuit Reports*, 3 vols. (Boston: Charles C. Little & James Brown, 1842-1845).

Wallace, John B., *Reports of Cases Argued and Determined in the Circuit Court of the United States for the Third Circuit* (Philadelphia: P.H. Nicklin & T. Johnson, 1838).

Wharton, Francis, *State Trials of the United States during the Administrations of Washington and Adams: With References, Historical and Professional, and Preliminary Notes on the Politics of the Times* (Philadelphia: Carey & Hart, 1849).

Washington, Bushrod, *Reports of Cases Argued and Determined in the Court of Appeal of Virginia*, 2 vols. (Richmond: Nicholson, 1798).

Books

Ashmore, Ann, *Dates of Arguments and Delivery of Opinions of Supreme Court Cases between 1791 and 1882* (Washington D.C.: Library of the Supreme Court of the United States, August 2006).

Bailyn, Bernard (ed.), *The Debate on the Constitution*, 2 vols. (New York: Library of America, 1993).

Baker, Sir John H. Q.C., *An Introduction to English History* (Oxford: Oxford University Press, 4th ed. 2002).

Bergh, Albert Ellery, *The Writings of Thomas Jefferson*, 20 vols. (Washington D.C.: Thomas Jefferson Memorial Association, 1903).

Binney, Horace, *Bushrod Washington* (Philadelphia: C. Sherman & Son, 1858).

Blackstone, Sir William, *Commentaries on the Laws of England*, 4th ed. 4 vols. (London. 1770).

Capon, Lester (ed.), *The Adams-Jefferson Letters* (Chapel Hill: University of North Carolina Press, 1959).

Farrand, Max (ed.), *Records of the Federal Convention of 1787*, 4 vols. (New Haven: Yale University Press, 1937).

Ford, Paul Leicester (ed.), *Thomas Jefferson: The Works*, 12 vols. (New York: G.P. Putnam's Sons, 1904).

Freeman, Joanne B., *Alexander Hamilton: Writings* (Library of America, 2001).

Freeman, Landa M; North, Louise V., and Wedge, Janet M. (eds.), *Selected Letters of John Jay and Sarah Livingston Jay* (Jefferson: North Carolina: MacFarland & Company Inc. Publishers, 2005).

- Hall, Kermit L & Hall, Mark David (eds.), *The Collected Works of James Wilson*, 2 vols. (Indianapolis: Liberty Fund, 2007).
- Hodgson, Adam, *Letters from North America* (London: Hurst, Robinson & Co., 1824).
- Holmes, Oliver Wendell, *Collected Legal Papers* (New York: Peter Smith, 1952).
- Hopkinson, Joseph, *In Commemoration of the Hon. Bushrod Washington. Late One of the Justices of the Supreme Court of the United States* (Philadelphia: T.S. Manning, 1830).
- Hudson, James H. (ed.), *A Supplement to Max Farrand's Records of The Federal Convention of 1797* (New Haven: Yale University Press, 1987).
- Israel, Fred L., *The State of the Union Messages of the Presidents, 1790-1966*, 3 vols. (New York: Chelsea House/Robert Hector Publishers, 1966).
- Johnson, Henry P., *The Correspondence and Papers of John Jay*, 4 vols. (New York: Burt Franklin, 1890).
- Johnson, Herbert A. & Hobson, Charles F. (eds.), *The Papers of John Marshall, 1773-1835*, 10 vols. (Chapel Hill: University of North Carolina Press, 1974-2006).
- Marcus, Maeva (ed.), *The Documentary History of the Supreme Court of the United States, 1789-1800*, 8 vols. (New York: Columbia University Press, 1985-2007).
- Peters, Richard (ed.), *The Public Statutes at Large of the United States*, vols. 1-4 (Boston: Charles C. Little & James Brown, 1845-1846).
- Peterson, Merrill D. (ed.), *Thomas Jefferson: Writings* (New York: Library of America, 1984).
- Quincy, Josiah, *Figures of the Past From the Leaves of Old Journals* (Boston: Roberts Bros., 4th ed. 1883), 189-190.
- Rakove, Jack N., *Madison: Writings* (New York: Library of America, 1999).
- Richardson, James D, *A Compilation of the Messages and Papers of the Presidents*, vol. 1 (Washington D.C: Bureau of National Literature and Art, 1905).
- Sheppard, Steve (ed.), *The History of Legal Education in the United States: Commentaries and Primary Sources*, 2 vols. (Pasadena, California: Salem Press Inc., 1999).
- Smith, James Morton, *Republic of Letters: The Correspondence between Thomas Jefferson and James Madison*, 3 vols. (New York: W.W. Norton and Company, 1995).
- Story, Joseph, *Commentaries on the Constitution of the United States*, 3 vols. (Boston: Hilliard, Gray & Co., 1833).
- Story, W.W. (ed.), *Life and Letters of Joseph Story*, 2 vols. (London: John Chapman, 1851).
- Story, W.W. (ed.), *The Miscellaneous Writings of Joseph Story* (Boston: Charles C. Little & James Brown, 1852).

Tucker, St. George, *Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 5 vols. (Philadelphia: William Birch & Abraham Small, 1803).

Washington, Henry Augustus, *Writings of Thomas Jefferson*, vol. IV (New York: Derby & Jackson, 1859).

Newspapers

Augusta Chronicle

Massachusetts Centinel

National Gazette

Niles Weekly Register

Pennsylvania Gazette

Government Department Documents

United States Census Bureau

Secondary Sources

Books

Abraham, Henry J., *Justices, Presidents, and Senators* (Lanham: Maryland: Rowman & Littlefield Publishers Inc., 1999). 1st edition, 1974).

Adams, Henry, *History of the United States of America during the Administration of Thomas Jefferson* (C. Scribner's Sons, 1889. Library of America edition edited by Earl N. Habert, 1986).

Anderson, Dice Robin, *William Giles: A Study in the Politics of Virginia and the Nation from 1790-1830* (Menasha, Wisconsin: Collegiate Press at George Banta Publishing Co., 1914).

Baker, Leonard, *John Marshall: A Life in the Law* (New York: Macmillan Publishers, 1974).

Beeman, Richard, *Plain Honest Men: The Making of the American Constitution* (New York: Random House, 2009).

Beveridge, Albert J., *The Life of John Marshall*, 4 vols. (Cambridge, Mass: Riverside Press, 1916).

Bilder, Mary Sarah; Marcus, Maeva, and Newmyer, R. Kent, *Blackstone in America: Selected Essays of Kathryn Preyer* (New York: Cambridge University Press, 2009).

Blaustein, Albert P. & Mersky, Roy M, 'Bushrod Washington,' in Friedman & Israel, *The Justices of the United States Supreme Court, 1789-1969* (New York: Chelsea House Publishers, 1969), 243-255.

- Broadwater, Jeff, *George Mason: Forgotten Founder* (Chapel Hill: University of North Carolina Press, 2006).
- Casper, Scott E., *Sarah Johnson's Mount Vernon* (New York: Hill & Wang, 2008).
- Castro, William R., *The Supreme Court in the Early Years of the Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia: University of South Carolina Press, 1995).
- Chernow, Ron, *Alexander Hamilton* (New York: Penguin Press, 2004).
- Chernow, Ron, *Washington: A Life* (London: Allen Lane, 2010).
- Corwin, Edward S. *John Marshall and the Constitution: A Chronicle of the Supreme Court* (Akron: Ohio: Summit Classic Press, 2013, a reprint of the 1919 1st. ed.).
- Commission on the Bicentennial of the United States Constitution, *The Supreme Court of the United States; Its Beginnings and its Justices, 1790-1991* (Washington D.C., 1992).
- Cushman, Clare (ed.), *The Supreme Court Justices: Illustrated Biographies, 1789-1993* (Washington D.C: Congressional Quarterly, 1993).
- Darbyshire, Penny, *Sitting in Judgment: The Working Lives of Judges* (Oxford and Portland, Oregon: Hart Publishing Ltd., 2011).
- Domnarski, William, *In the Opinion of the Court* (Urbana & Chicago: University of Illinois Press, 1996).
- Dunne, Gerald T., *Justice Joseph Story and the Rise of the Supreme Court* (New York: Simon & Schuster, 1970).
- Duxbury, Neil, *The Nature and Authority of Precedent* (Cambridge: Cambridge University Press, 2008).
- Ellis, Joseph E., *His Excellency: George Washington* (New York: Alfred A. Knopf, 2004).
- Ellis, Richard E., *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971).
- Epstein, Lee, Segal, Jeffrey A., Spaeth, Harold J. & Walker, Thomas G. (eds.), *The Supreme Court Compendium: Data, Decisions & Developments* (Washington D.C: CQ Pres. 2003).
- Frank, John F, *Justice Daniel Dissenting: A Biography of Peter V. Daniel, 1784-1860* (Cambridge: Harvard University Press, 1964).
- Frankfurter, Felix, *The Commerce Clause under Marshall, Taney & White*, (Chapel Hill: University of North Carolina Press, 1937).
- Friedman, Lawrence M., *A History of American Law* (New York: Simon & Shuster, 1973).

- Friedman, Leon & Israel, Fred E., *The Justices of the United States Supreme Court, 1789-1969*, vol. 1 (New York: Chelsea House Publishers, 1969)
- Garrison, Tim Alan, *The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations* (Athens: University of Georgia Press, 2002).
- Goebel, Julius, Jr, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (New York: The Macmillan Company, 1971).
- Graham, D. Kurt, *To Bring Law Home: The Federal Judiciary in Early National Rhode Island* (DeKalb, Illinois: Northern Illinois University, 2010).
- Gunther, Gerald (ed.), *John Marshall's Defence of McCulloch v. Maryland* (Stanford: Stanford University Press, 1969).
- Hall, Kermit L., & Ely, James W., *The Oxford Guide to United States Supreme Court Decisions* (New York: Oxford University Press, 2nd. ed., 2009).
- Haskins, George & Johnson, Herbert A., *History of the Supreme Court of the United States, vol. II, Foundations of Power: John Marshall, 1801-1815* (New York: Cambridge University Press, 2010, originally published by Macmillan, 1981).
- Haw, James; Beirne, Francis; Beirne, Rosamund & Jett, Samuel R., *Stormy Patriot: The Life of Samuel Chase* (Baltimore: Maryland Historical Society, 1980).
- Henderson, Dwight D., *Courts for a New Nation* (Washington D.C: Public Affairs Press, 1971).
- Hobson, Charles F., *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996).
- Hoffer, Peter Charles & Hull, N.E.H., *Impeachment in America, 1635-1805* (New Haven: Yale University Press, 1984).
- Horwitz, Morton J., *Transformation of American Law, 1780-1860* (Cambridge, Mass: Harvard University Press, 1977).
- Johnson, Herbert A., *The Chief Justiceship of John Marshall* (Columbia: University of South Carolina Press, 1997).
- Killenbeck, Mark R., *McCulloch v. Maryland: Securing a Nation* (Lawrence: University Press of Kansas, 2006).
- McClelland, James, *Joseph Story and the American Constitution* (Norman: University of Oklahoma Press, 1971).
- Maier, Pauline, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon & Schuster, 2010).
- Morgan, Donald G., *Justice William Johnson: The First Dissenter* (Columbia: University of South Carolina Press, 1954).
- Newmyer, R. Kent, *The Supreme Court under Marshall and Taney* (Wheeling, Illinois: Harlan Davidson Inc., 1968).

- Newmyer, R. Kent, *Supreme Court Justice Story: Statesman of the Old Republic* (Chapel Hill: University of North Carolina Press, 1985).
- O'Connor, John E., *William Paterson: Lawyer and Statesman, 1745-1806* (New Brunswick, N.J: Rutgers University Press, 1979).
- Parker, Kunal M., *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism* (New York: Cambridge University Press, 2011).
- Petrie, Donald A., *Lawful Looting on the High Seas in the Days of Fighting Sail* (Annapolis: Naval Institute Press, 1999).
- Pfeffer, Leo, *This Honorable Court* (Boston: Beacon Press, 1965).
- Presser, Stephen B., Foreword to 1990 reprint of James McClellan, *Joseph Story and the American Constitution* (Norman: University of Oklahoma Press, 1971).
- Ritz, Wilfred J., (ed. by Holt, Wythe & Larue, L.H.), *Rewriting the History of the Judiciary Act 1789* (Norman: University of Oklahoma Press, 1990).
- Robarge, David A., *A Chief's Progress: From Revolutionary Virginia to the Supreme Court* (Westport, Conn: Greenwood Press, 2000).
- Roper, Donald Malcolm, *Mr Justice Thompson and the Constitution* New York: Garland Publishing Inc., 1987).
- Rossiter, Clinton (ed.), *The Federalist Papers* (New York: Signet Classic, 2003).
- Scott, James Brown, *Prize Cases Decided in the United States Supreme Court, 1789-1918*. Vol.1, (Oxford: Clarendon Press, 1923).
- Rustein, Michael H., *The Privateering Stroke: Salem Privateers and the War of 1812* (Salem: Create Space Independent Publishing Platform, 2012).
- Seculow, Jay Alan, *Witnessing Their Faith: Religious Influence on Supreme Court Justices and their Opinions* (Lanham, Maryland: Rowman & Littlefield Publishers Inc., 2006).
- Sharp, James Roger, *American Politics in the Early Republic: The New Nation in Crisis* (New Haven: Yale University Press, 1993).
- Simon, James F., *What Kind of Nation: Thomas Jefferson, John Marshall and the Epic Struggle to Create a United States* (New York: Simon & Schuster, 2002).
- Spaeth, Harold J. & Segal, Jeffrey, *Majority Rule or Minority Will* (Cambridge: Cambridge University Press, 1999).
- Sutherland, Arthur E, *The Law at Harvard: A History of Men and Ideas, 1817-1967* (Cambridge, Mass: Harvard University Press, 1967).
- Stahr, Walter, *John Jay* (New York: Hambledon & Continuum, 2005).
- Street, Alfred Billings, *The Council of Revision of the State of New York: Its History. a History of the Courts with which its Members were Connected, Biographical Sketches of its Members, and its Vetoes*, (Albany: William Gould, 1859).

Surrency, Erwin C., *History of the Federal Courts* (New York: Oceana Publications Inc., 2002).

Urofsky, Melvin I, *A March of Liberty: A Constitutional History of the United States*, vol.1 (New York: Oxford University Press, 3rd ed., 2011).

Warren, Charles, *The Supreme Court in United States History*, 2 vols. Revised edition (Boston: Little Brown & Co., 1926).

Weisenburger, Francis P. *The Life of John McLean: A Politician on the United States Supreme Court* (Columbus: The Ohio University Press, 1937).

White, G. Edward, *History of the Supreme Court of the United States*, vols. III-IV, *The Marshall Court and Cultural Change, 1815-1835* (New York: Cambridge University Press, 2010), originally published by Macmillan, 1988).

White, G. Edward, *Law in American History*, vol. 1 (New York: Oxford University Press, 2012).

Wood, Gordon S., *Empire of Liberty: A History of the Early Republic, 1789-1815* (New York: Oxford University Press, 2009).

Articles and Essays

Baker, H. Robert, 'A Better Story in *Prigg v. Pennsylvania*.' *Journal of Supreme Court History*, 2014. Vol.10, No. 2, 169-189.

Dunne, Gerald T., 'Brockholst Livingston in Friedman & Israel, '*Justices*,' 1969, 387-403.

Dunne, Gerald T., 'Smith Thompson,' in Friedman & Israel, *Justices*, 1969, 475-492.

Dunne, Gerald T., 'The Story-Livingston Correspondence,' *American Journal of Legal History*, vol.10 (1966), 224-236.

Faber, David A., 'Bushrod Washington and the Age of Discovery in American Law,' *West Virginia Law Review*, vol. 102 (2000), 735-807.

Finkleman, Paul, 'Story Telling on the Supreme Court: *Prigg v. Pennsylvania* and Justice Story's Judicial Nationalism,' *The Supreme Court Review* (1994), 247-294.

Hall, Kermit L., 'The Courts, 1790-1920, in Michael Grossberg and Christopher Tomlins (eds.), *The Cambridge History of Law in America, Volume II, The Long Century, 1789-1920* (New York: Cambridge University Press, 2008), 106-132.

Hall, Timothy L., 'Brockholst Livingston,' in *Supreme Court Justices: A Biographical Dictionary* (New York: Facts on File Inc., 2001), 55-58.

Hall, Timothy L., 'Smith Thompson,' in *Supreme Court Justices: A Biographical Dictionary* (New York: Facts on File Inc., 2001), 70-73.

- Heaney, Howell J., 'The Letters of Joseph Story in the Hampton L. Carson Collection of the Free Library of Philadelphia,' *The American Journal of Legal History*, vol. 2, No. 1 (1958), 68-86.
- Hobson, Charles F., 'Defining the Office: John Marshall as Chief Justice,' *University of Pennsylvania Law Review*, vol. 154, No. 6 (2006), 1421-1461.
- Hobson, Charles F., 'St. George Tucker's Papers,' *William & Mary Law Review*, vol. 47, Issue 4, Article 6 (2006), 1245-1278.
- Holt, Wythe, 'To Establish Justice: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts,' *Duke Law Journal*, vol. 6 (1989), 1421-1531.
- Johnson, Herbert A., 'Judicial Institutions in Emerging Federal Systems: The Marshall Court and the European Court of Justice,' 33 *John Marshall Law Review* (2000), 1063-1108.
- Johnson, Herbert A., 'Bushrod Washington,' *Vanderbilt Law Review*, 62:2 (2009), 447-490.
- Kaufman, Paul W., 'Disbelieving Non-Believers: Atheism, Competence, and Credibility in the Turn of the Century,' *Yale Journal of Law and the Humanities*, vol. 15:2 (2003), 395-433.
- Kelsh, John P., 'Opinion Delivery Practices of the United States Supreme Court, 1790-1945,' *Washington University Law Quarterly*, vol. 77 (1999), 137-182.
- Kerber, Linda K., *Federalists in Dissent: Imagery and Ideology in Jeffersonian America* (Ithaca: Cornell University Press, 1970).
- Langbein, John H., 'Chancellor Kent and the History of Legal Literature,' *Columbia Law Review*, vol. 93 (1993), 547-594.
- Langbein, John H., 'Blackstone, Litchfield, and Yale,' in Anthony T. Kronan (ed.), *History of Yale Law School: The Tercentennial Lectures* (New Haven: Yale University Press, 2004), 17-52.
- Lee, Thomas R., 'Stare Decisis in Historical Perspective: From the Founding Fathers to the Rehnquist Court,' *Vanderbilt Law Review*, vol.52 (1999), 647-735.
- MacGill, Hugh C, and Newmyer, R. Keny, 'Legal Education & Legal Thought, 1790-1920,' in Michael Grossberg and Christopher Tomlins, *The Cambridge History of Law in America*, vol. II (New York: Cambridge University Press, 2008), 36-67.
- Mead, Joseph E., 'Stare Decisis in the Inferior Courts of the United States,' *Nevada Law Journal*, vol. 12 (2012), 787-830.
- Newmyer, R. Kent, 'Justice Joseph Story on Circuit and a Neglected Phase of American Legal History,' *The American Journal of Legal History*, vol. 14, No. 2 (1970), 112-135.
- Paulson, Michael Stokes, 'Abrogating Stare Decisis by Statute,' 109, *Yale Law Review* (2000), 1535-1602.

Preyer, Kathryn, 'Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic,' *Law and History Review*, IV, (1986), 223-265.

Ragsdale, Bruce A., 'Amistad: The Federal Courts and the Challenge to Slavery,' (Federal Judicial Center, Federal Judicial History Office, 2002), 1-92.

Ragsdale, Bruce A., 'The Sedition Act Trials,' (Federal Judicial Center, Federal Judicial History Office, 2005), 1-83.

Roper, Donald M., 'Judicial Unanimity and the Marshall Court: A Re-appraisal,' *American Journal of Legal History*, vol. 9, No. 2 (1965), 118-134.

Stonier, James R. Jr., 'Heir Apparent: Bushrod Washington and Federal Justice in the Early Republic,' in Gerber, Scott (ed.) *Seriatim: The Supreme Court before John Marshall* (New York: New York University Press, 1998), 322-349.

Surrency, Edwin C., 'Law Reports in the United States,' *The American Journal of Legal History*, vol. 25, No. 1 (1981), 48-66.

Surrency, Edwin C., 'Federal District Court Judges and the History of their Courts,' *History of the Federal Courts*, Pamphlet No. 1 (1966), 1-172.

Van Hook, Matthew, 'Founding the Third Branch: Judicial Greatness and John Jay's Reluctance,' *Journal of Supreme Court History*, vol. 40, no. 1 (2015), 1-19.

Warren, Charles C., 'The Story Marshall Correspondence (1812-1831),' *William & Mary Quarterly*, Second Series, vol. 21, No. 1 (1941), 1-26.

Washington, Bushrod C, 'The Late Mr Justice Bushrod Washington,' *The Green Bag*, vol. IX, No. 8 (Boston, August 1897), 329-335.

Watts, Steven, *The Republic Reborn: War and the Making of Liberal America, 1790-1820* (Baltimore: John Hopkins University Press, 1987).

Wheelan, Joseph, *Jefferson's Vendetta: The Pursuit of Aaron Burr and the Judiciary* (New York: Carroll and Graff Publishers, 2005).

Unpublished PhD Thesis

Annis, David Leslie, *Bushrod Washington* (University of Notre Dame, August 1974).