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## Bushrod Washington

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# Bushrod Washington

*Herbert A. Johnson\**

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In October 1822, President Thomas Jefferson urged Justice William Johnson to take the lead in reinstating the Jay-Ellsworth Court's<sup>1</sup> practice of issuing *seriatim* opinions. He extolled the English preference for documenting each judge's reasoning on the issues before the Court and deplored its recent abandonment under the influence of

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1. John Jay of New York was the first Chief Justice of the U.S. Supreme Court. He resigned from the Court to assume his duties as governor of New York in 1795. Thereafter John Rutledge of South Carolina received an interim appointment as Chief Justice, only to be later refused senatorial confirmation for a permanent appointment; Oliver Ellsworth of Connecticut was appointed in March 1796 and resigned in 1800 while serving as minister to France. This era of the Court's history has been traditionally known as that of Jay and Ellsworth, the two longest-serving Chief Justices during the years before 1801. See generally WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH (1995).

Lord Mansfield.<sup>2</sup> Justifying his own silent acquiescence in opinions of the Marshall Court, Johnson pointed to the situation when he joined the U.S. Supreme Court in 1804.<sup>3</sup> He recalled that "Cushing was incompetent. Chase could not be got to think or write—Patterson [sic] was a slow man and willingly declined the trouble, and the other two judges you know are commonly estimated as one judge."<sup>4</sup> Johnson's biographer Donald Morgan indicates that Justice Johnson was referring to Chief Justice Marshall and Justice Bushrod Washington as those Justices understood to act as one judge.<sup>5</sup> Yet Morgan also asserts that these two members of the Court, despite their twinning in the public mind, were in Johnson's view those most entitled to respect among all of his other colleagues.<sup>6</sup>

We need to rethink Justice Johnson's identification of Marshall and Washington as "one judge," which arose presumably because of their parallel approaches to law and the Constitution. This analysis is important for two reasons: (1) Bushrod Washington's record needs to be reexamined before his habitual silence condemns him to eternal oblivion as Chief Justice Marshall's shadow, and (2) closer attention to Justice Washington's activities provides a clearer understanding of the role a single Justice played within the internal dynamics of the Marshall Court. The second reason is the most important, for it elevates our focus beyond merely adding to the hagiography on little-known Supreme Court Justices. Indeed, it places us in the mainstream of Court history at a most interesting period of institutional development. Such scholarly opportunities are too good to pass up. Despite neglect by academic scholars, each member of the U.S. Supreme Court is, and always has been, critical to the Court's

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2. DONALD G. MORGAN, JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER: THE CAREER AND CONSTITUTIONAL PHILOSOPHY OF A JEFFERSONIAN JUDGE 168–69 (1954).

3. *Id.* at 182.

4. Letter from William Johnson to Thomas Jefferson (Dec. 10, 1822), in MORGAN, *supra* note 2, at 181–82. Given Johnson's circumstances as the lone Jeffersonian appointee on the Court from 1804 through 1811, he may be excused for an overly harsh assessment. Both Chase and Paterson were threatened with impeachment for circuit court trials of Jeffersonian newspaper publishers; Chase was impeached but narrowly acquitted after a trial before a Jeffersonian dominated Senate. Herbert A. Johnson, *Chief Justice Marshall (1801–1835)*, 23 J. SUP. CT. HIST. No. 1, at 3, 9 (1998). Paterson, a shopkeeper's son, unsuccessfully attempted to maintain his contacts with Princeton classmates, and was a leading contender for elevation to the Chief Justiceship in 1801. *Id.* at 9–10. Cushing was elderly, and had declined the Chief Justiceship nomination in 1795. *Id.* at 10. But see Scott D. Gerber, *Deconstructing William Cushing*, in SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 97, 97–125 (Scott D. Gerber ed., 1998) [hereinafter SERIATIM] (arguing contrary to general scholarly opinion that Cushing was a competent and effective member of the Court).

5. MORGAN, *supra* note 2, at 182.

6. *Id.*

decisionmaking. Indeed, we cannot fully explain the achievements of the “great Justices” unless we examine the personalities, preferences, and voting patterns of their lesser-studied colleagues.

### I. THE MARSHALL COURT AND ITS JUDICIAL “TWINS”

Charles Hobson has correctly identified John Marshall as “The Great Chief Justice,”<sup>7</sup> but even in the presence of such a powerful leader, the collegial nature of the Court’s work emerges quite clearly. Marshall was emphatically a “people person,” endowed with a politician’s adroitness in achieving consensus and gaining cooperation. He was also noted for his intelligence and pragmatism.<sup>8</sup> The very process of shaping “Opinions of the Court” demanded that the separate voices of the other Justices be harmonized into an opinion acceptable to all or a majority of the bench. As Paul Kahn has persuasively argued, the institution of the “Opinion of the Court” not only shielded individual Justices from criticism and concealed their differences; it also endowed their shared work with an institutional solidarity and moral authority that were necessarily lacking in a collection of *seriatim* opinions.<sup>9</sup>

#### *A. Small Group Dynamics and the Marshall Court*

As an important member of Chief Justice Marshall’s closest circle within the Court, Bushrod Washington is perhaps more distinguished than many of the Justices highlighted in this Symposium. Undoubtedly, he was influenced by the small group dynamics that shaped the Court at this early period of its evolution. Washington lived in the same Washington, D.C. boardinghouse with the other Justices, shared meals with them, and frequently engaged in both formal and informal conferences within the same four walls. Disagreement would be minimized and perhaps even trivialized with the Justices living in such proximity to one another. Justice Johnson

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7. CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* (William Carey McWilliams & Lance Banning eds., 1996).

8. HOBSON, *supra* note 7, at 155; Johnson, *supra* note 4, at 8.

9. Johnson, *Marshall*, *supra* note 4, at 8 (commenting on the Court opinion in *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 207–08 (1819), “[I]s it not in the very nature of opinions of the Court that, to be collective, they must be the product of compromises worked out in Conference?”); see also PAUL W. KAHN, *THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA* 101–24, 211–19 (1997) (speculating that the opinion of the Court asserts both the impersonality and the impartiality of the law, and appeared to embody the will of the people on a given point of law).

painfully recollected his discomfort when his colleagues discovered that he planned to issue a separate opinion:

[D]uring the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation the Virginia appellate court had sustained by pursuing such a course. At length I found that I must either submit to circumstances or become such a cipher in our consultations as to effect no good at all.<sup>10</sup>

The boardinghouse atmosphere also encouraged close attention to Court business even during what would otherwise be leisure hours. Toward the end of Marshall's Chief Justiceship, when the collegial residence of the Court in a single boardinghouse was beginning to unravel, Justice Joseph Story decided that he would bring his wife with him to Washington for Court sessions and that she would stay with the Justices in their boardinghouse.<sup>11</sup> While the Chief Justice was gracious enough to extend a chivalrous welcome to Sarah Story, she apparently took Marshall's hint that her presence might distract her husband from his work. Sarah Story never again returned to Washington for the Court's sessions.<sup>12</sup>

Despite the sheltered refuge of the boardinghouse, the Justices were painfully aware of their isolation from Washington society during the presidency of Thomas Jefferson and the first years of the Madison Administration. As researchers have noted, ostracism and pressure from external forces tend to increase the bonds of connection among group members.<sup>13</sup> Furthermore, small groups under such pressure tend to instill self-discipline on group members to create conformity and to encourage behavior acceptable by group standards.<sup>14</sup> Social ostracism was somewhat relieved, however, after Justice Thomas Todd courted and wed Dolly Madison's niece, Lucy Payne, and it virtually disappeared after James Monroe, a boyhood

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10. MORGAN, *supra* note 2, at 182.

11. Johnson, *supra* note 4, at 15–16.

12. *Id.* at 16; see also G. EDWARD WHITE, 3–4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE MARSHALL COURT AND CULTURAL CHANGE, 1815–35, at 189, 193 (Paul A. Freund & Stanley N. Katz eds., 1988) (observing that the boardinghouse provided a fraternal setting not conducive to dissent, and that in 1829, the year of Justice Washington's death, the boardinghouse arrangement was well into decline).

13. PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 170, 198, 295 (1964); see also ELTON T. REEVES, THE DYNAMICS OF GROUP BEHAVIOR 129–30 (1970) (asserting that this cohesion can enhance creative and innovative activity within the group). An expansive discussion of the Marshall Court and modern social psychology appears in Robert G. Seddig, *John Marshall and the Origins of Supreme Court Leadership*, 36 U. PITTS. L. REV. 785, 788–92 (1978).

14. Muzafer Sharif, *Introductory Statement*, in INTERGROUP RELATIONS AND LEADERSHIP: APPROACHES AND RESEARCH IN INDUSTRIAL, ETHNIC, CULTURAL AND POLITICAL AREAS 19 (Muzafer Sharif ed., 1962). For Justice Johnson's experience in this regard, see MORGAN, *supra* note 2 (describing Justice Johnson's discomfort when his colleagues discovered that he planned to issue a separate opinion).

classmate of the Chief Justice, became President in 1817.<sup>15</sup> On the other hand, political and judicial reform pressures continued to harass the Court until and beyond Bushrod Washington's death in 1829. Generated by strenuous state and congressional efforts to limit the Supreme Court's federal question jurisdiction and to expand states' rights through ambiguities in the Eleventh Amendment, the possibility of reprisals was an ever-present factor in the thoughts and behavior of all the Justices.<sup>16</sup>

### *B. A Tale of Two Justices*

Against this background the long and deep friendship between Chief Justice Marshall and Justice Bushrod Washington was forged. General George Washington's nephew and heir began his Supreme Court service in the more tranquil days of the Jay-Ellsworth Court, when all of the Justices were appointees of the Federalists.<sup>17</sup> At that point in the Court's development, relatively few cases moved through the state and federal court systems, and the high Court lacked a significant appellate caseload. The Jeffersonian sweep of the 1800 elections dramatically altered the political and power relationships among the three branches of government, however, and thrust an elderly—and Federalist-appointed—Supreme Court into the unenviable position of confronting the other two branches of government and defending the constitutional vision of a disintegrating Federalist party.<sup>18</sup> When John Marshall became Chief Justice in January 1801, Justice Washington was the youngest Justice on the Court and was senior in service only to Justice Alfred Moore of North Carolina, who would resign from the Court in 1804.<sup>19</sup> Freshman Congressman Joseph Story met Justice Washington in 1808 and indicated that, while the Justice was mild and unassuming in demeanor, he was highly esteemed as a profound lawyer.<sup>20</sup> Two decades later, after Justice Washington's death, Story was more precise in his analysis:

[H]is mind was solid, rather than brilliant, sagacious and searching, rather than quick and eager; slow but not torpid; steady, but not unyielding; comprehensive, but at the

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15. Johnson, *supra* note 4, at 14–16.

16. HOBSON, *supra* note 7, at 127–32; HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–1835, at 71–72, 77, 79, 83–84 (1997).

17. JOHNSON, *supra* note 16, at 22–23.

18. *Id.* at 30–32.

19. *Id.* at 22–23.

20. JOHNSON, *supra* note 16, at 23–24.

same time cautious.... He was, by original temperament, mild, conciliating and candid, and yet he was remarkable for an uncompromising firmness.<sup>21</sup>

Quite by chance, Chief Justice Marshall was partially responsible for Washington's nomination to the Supreme Court. The two had been summoned to Mount Vernon by General Washington, who persuaded both men to run as Federalist candidates for congressional seats in Virginia.<sup>22</sup> When Associate Justice James Wilson died before the campaign had begun, President John Adams offered the seat to Marshall, who declined but suggested that if Washington was nominated he would probably accept.<sup>23</sup> Marshall's recommendation was based upon a long personal and professional acquaintance with Washington.<sup>24</sup> Together they attended George Wythe's 1780 law lectures at the College of William and Mary, and both were members of Phi Beta Kappa. When Marshall went on to begin a country law practice in Fauquier County, Virginia, Washington moved to Philadelphia to continue his legal studies with James Wilson, who would later become one of the original Justices of the Supreme Court. Marshall and Washington's careers crossed again when, after 1783, both began to build reputations as fellow members of the Richmond appellate bar.<sup>25</sup> This was a specialized group of counsel who appeared in Virginia's superior courts, and Bushrod Washington was the reporter of a two-volume set of reports on cases decided in the Virginia Court of Appeals, which was the highest court of law and equity in the Old Dominion.<sup>26</sup> After Washington's 1798 appointment to the Supreme Court, Marshall was elected to Congress, where he was honored with the responsibility of memorializing George

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21. *Id.* at 24. Story's catalog of his colleague's strengths and weaknesses would seem to emphasize many virtues that Story himself lacked, but which he apparently both appreciated and viewed as behavior he would like to emulate.

22. *Id.* at 22.

23. GEORGE L. HASKINS & HERBERT A. JOHNSON, 2 THE HISTORY OF THE UNITED STATES SUPREME COURT, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-15, at 97 (Paul A. Freund ed., 1981); JOHNSON, *supra* note 16, at 22; 3 THE PAPERS OF JOHN MARSHALL 507-08 (Charles F. Hobson et al. eds., 1974-2006) [hereinafter MARSHALL PAPERS]. Additional details concerning Washington's nomination and service on the Court are at WHITE, *supra* note 12, at 345-47.

24. JOHNSON, *supra* note 16, at 23.

25. *Id.* at 22-23.

26. 5 MARSHALL PAPERS, *supra* note 23, at 4, 454, 457. Marshall and Bushrod Washington were associated as co-counsel in several cases and they had also served together on a legislative law revision committee in 1796. 2 MARSHALL PAPERS, *supra* note 23, at 89, 160, 282-89, 319, 481; 12 MARSHALL PAPERS, *supra* note 23, at 578; see also James R. Stoner, Jr., *Heir Apparent: Bushrod Washington and Federal Justice in the Early Republic*, in SERIATIM, *supra* note 4, at 324, 327 (describing Washington's reports of Virginia Court of Appeals cases to be "a pioneering effort when there were no official court reports or systematic written opinions").

Washington in a eulogy delivered before the House of Representatives in 1799.<sup>27</sup>

Shortly after Marshall assumed his duties as Chief Justice, he and Washington worked together to prepare Marshall's five volume *Life of George Washington*.<sup>28</sup> Although the Chief Justice was clearly the author of the biography, Bushrod Washington's role was far more involved than simply supplying materials as the executor of his uncle's estate. Their collaboration seems to have begun in March 1802, when General Washington's papers were delivered to the Chief Justice. Though neither Justice wanted his association with the project to become widely known, the Chief Justice felt free to write General Charles Cotesworth Pinckney, a South Carolina Federalist leader, to recruit his assistance in describing the southern campaigns of the Revolution.<sup>29</sup> Unfortunately, the correspondence between Marshall and Washington is far from complete, but it is apparent from the surviving manuscripts that Washington's presence in Philadelphia facilitated contact with the publisher, Caleb P. Wayne. The two Justices shared the task of proofreading and indexing each of the volumes, and while Washington usually was asked to convey Marshall's wishes to Wayne, there were occasions when Marshall authorized Washington to make independent decisions concerning the text.<sup>30</sup> In January 1804, Marshall finally agreed to Wayne and Washington's urging that his name appear as author of *The Life of George Washington*, but he persisted in his determination that his official position as Chief Justice not be indicated on the title page of

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27. JOHNSON, *supra* note 16, at 23.

28. The project had been discussed before Marshall's nomination to be Chief Justice and while he was secretary of state. Letter from Caleb P. Wayne to John Marshall (Oct. 3, 1800), in 4 MARSHALL PAPERS, *supra* note 23, at 314. The first publication of this work was 1-5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON (Caleb P. Wayne 1804-1807); a second edition, issued under the same title, was published in 1833, but in a two volume format, by J. Crissy of Philadelphia. An extensive introductory comment on colonial history, first published in the 1804-1807 edition, had been republished as JOHN MARSHALL, A HISTORY OF THE COLONIES PLANTED BY THE ENGLISH ON THE CONTINENT OF NORTH AMERICA (Abraham Small 1824). The first edition appeared in several foreign language editions, and the second edition was reprinted frequently in the nineteenth century, presumably as a school textbook.

29. 6 MARSHALL PAPERS, *supra* note 23, at 124. It seems likely that both were inclined toward anonymity for two reasons. The first would be a desire to avoid politically motivated attacks on the biography and rekindle partisan conflicts that marked the end of George Washington's Administration. The second would be the risk of involving the Supreme Court in controversy through an extra-judicial publication.

30. *Id.* at 274-75, 294 n.1, 306, 320. In July 1804, Wayne informed Marshall that Washington had permitted Wayne to give a copy of the volume three manuscript to Charles Chauncy, with a view toward getting the information Marshall needed. *Id.* at 305.

the volumes.<sup>31</sup> Six months later, Marshall advised Wayne that he could not break the seals on the box containing materials on the “conspiracy against General Washington” because Justice Washington did not wish him to do so.<sup>32</sup> However, he did write to Washington to gain permission to examine the manuscripts.<sup>33</sup>

Publication of the first edition of *The Life of George Washington* did not terminate Marshall and Washington’s shared labors. Marshall’s discontent with the accuracy of the first edition impelled him to remedy those errors; at the same time, Caleb Wayne refused to publish a new edition unless it was sharply abridged.<sup>34</sup> During these 1821 negotiations, Marshall and Washington began work on an edition of General Washington’s correspondence, a project that was most reluctantly but prudently abandoned to Jared Sparks, the historian and editor of several other statesmen’s papers.<sup>35</sup>

Justice Washington’s close collaboration with the Chief Justice also extended to the work of the Supreme Court. When Marshall was faced with admiralty issues in his assigned circuit courts,<sup>36</sup> he wrote to Washington for advice.<sup>37</sup> Similarly, he sought his fellow Virginian’s advice on complex issues in negotiable instruments law.<sup>38</sup> Washington’s duties in the U.S. Circuit Courts for New Jersey and Pennsylvania had involved him in a large number of maritime and

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31. Letter from John Marshall to Caleb P. Wayne (Jan. 10, 1804), in 6 MARSHALL PAPERS, *supra* note 23, at 250.

32. Letter from John Marshall to Caleb P. Wayne (July 3, 1804), in 6 MARSHALL PAPERS, *supra* note 23, at 299.

33. *Id.* The interchange of letters would suggest that, in accordance with the existing scholarly practices, materials dealing with a deceased biographee’s life were not examined without the permission of his family, and that the practice was followed in regard to Marshall’s *THE LIFE OF GEORGE WASHINGTON*.

34. Letter from John Marshall to Bushrod Washington (Dec. 27, 1821), in 9 MARSHALL PAPERS, *supra* note 23, at 195–96.

35. Letters from John Marshall to Bushrod Washington (July 6, 1821, Dec. 27, 1821, May 28, 1823, June 25, 1823, Apr. 19, 1825), in 9 MARSHALL PAPERS, *supra* note 23, at 195–96, 238, 322, 328–29; Letter from John Marshall to Bushrod Washington (Apr. 9, 1825), 10 MARSHALL PAPERS, *supra* note 23, at 170; Letter from John Marshall to Jared Sparks (Mar. 16, 1826), 10 MARSHALL PAPERS, *supra* note 23, at 276–77. A recent short article casts additional light upon the Sparks’s edition of George Washington’s papers, and Chief Justice Marshall’s role in bringing that project to fruition. Jude M. Pfister, *Jared Sparks and Justices Washington, Marshall and Story*, Q. NEWSL. SUP. CT. HIST. SOC., July 2008, at 9–11.

36. Until 1892 Supreme Court Justices were expected to hold circuit courts for the trial of federal cases; during his term as Chief Justice, John Marshall assigned himself the circuit courts held in Virginia and North Carolina. JOHNSON, *supra* note 16, at 112–13, 116.

37. Letter from John Marshall to Bushrod Washington (May 25, 1813), in 7 MARSHALL PAPERS, *supra* note 23, at 390.

38. Letter from John Marshall to Bushrod Washington (May 31, 1813), in 8 MARSHALL PAPERS, *supra* note 23, at 315.

commercial law cases.<sup>39</sup> In exchange, when in 1823 Washington was completing his editorial work as reporter of the second volume of Virginia Court of Appeals cases, Marshall made two visits to the Virginia Chancery Court's record office to verify in the original manuscripts the accuracy of a 1792 published report.<sup>40</sup>

Paramount among Justice Washington's activities supporting the Chief Justice was his role in arranging the pseudonymous publication of Marshall's "Friend of the Union" and "Friend of the Constitution" essays. Written to defend the Court's 1819 decision in *McCulloch v. Maryland*<sup>41</sup> against the attacks by "Amphictyon" (Judge William Brockenbrough) and "Hampden" (Judge Spencer Roane) published in the pro-Jeffersonian *Richmond Enquirer*, Marshall's essays were published in the *Alexandria Gazette*.<sup>42</sup> To protect his anonymity in this extraordinary effort to shield the Court from states' rights criticism, Marshall forwarded the manuscripts to Washington for placement with the Alexandria newspaper.<sup>43</sup> He also cautioned Washington not to send correspondence or copies of the essays directly to him, lest they fall into hostile hands or create a suspicion that he was the author.<sup>44</sup> To the chagrin of both men, the Alexandria printer garbled the text of Marshall's essays, and the correct version did not appear in print until they were reprinted in 1969 under the editorship of Gerald Gunther.<sup>45</sup> Drafting the essays was an extraordinary departure from judicial decorum, but even more striking is the degree to which Marshall trusted his reputation to the loyalty and discretion of Bushrod Washington.<sup>46</sup> The relationship unquestionably was

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39. *Id.*; Letter from John Marshall to Bushrod Washington (May 31, 1814), in 8 MARSHALL PAPERS, *supra* note 23, at 315; Letter from John Marshall to Bushrod Washington (July 13, 1821), in 9 MARSHALL PAPERS, *supra* note 23, at 180.

40. Letters from John Marshall to Bushrod Washington (Apr. 15, 1822, June 17, 1822), in 9 MARSHALL PAPERS, *supra* note 23, at 201, 237–38.

41. The case brought before the Court the constitutionality of a Maryland statute taxing the notes issued by the Bank of the United States. 17 U.S. (4 Wheat.) 316, 400 (1819). Marshall's opinion for the Court upholding Congress's chartering of the Bank relied upon powers to be implied from the Constitution, and a broad interpretation of the Necessary and Proper Clause. *Id.* at 406–24. It also established the primacy of federal action under the Supremacy Clause when the federal actions are duly authorized by the Constitution. *Id.* Thus, the Court ruled that the notes issued by the Bank of the United States might not be taxed by a state. *Id.* at 437.

42. 8 MARSHALL PAPERS, *supra* note 23, at 282.

43. *Id.* at 282–83.

44. Both the logic and the rhetoric of the interchange is thoroughly, but briefly, discussed in WHITE, *supra* note 12, at 552–67; see also 8 MARSHALL PAPERS, *supra* note 23, at 282–87, 317 (providing the text of Marshall's essays).

45. GERALD GUNTHER, JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 52–77 (Gerald Gunther ed., 1969).

46. JOHNSON, *supra* note 16, at 24.

extremely close, even among a group of Supreme Court Justices who seem to have worked very closely together.

To demonstrate the cooperative and supportive behavior of Marshall Court Justices toward each other, Professor White points to the fact that Justices Washington and Story exchanged "semiannual reports" concerning the most interesting cases tried in their respective circuit courts. He further speculates that this practice may have been widespread among Marshall Court Justices. White proposes that

a group of justices on the Marshall Court—Story, Washington, and Marshall were conspicuous among them, with perhaps the less active support of Todd and Livingston—were [sic] self-consciously interested in shaping federal law, expanding federal jurisdiction, and creating opportunities to do so. The correspondence about circuit decisions would then serve as a vehicle for fulfilling such goals.<sup>47</sup>

Close control over the major issues presented at the circuit level undoubtedly dovetailed with the Supreme Court's use of the certificate of division procedure initiated by the Judiciary Act of 1802. When the Supreme Court Justice assigned to the circuit disagreed with the district court judge sitting with him, they could certify the question to the Supreme Court en banc, thus resolving a troublesome issue of law arising in the circuit.<sup>48</sup> Indeed, given the possibility of an extended interchange of "semiannual reports" among the Justices, the certificate of division opportunity might also have facilitated early determination of conflicts between and within the circuits.<sup>49</sup>

The exchange of professional information concerning circuit cases also strikingly parallels the personal friendships among Marshall Court Justices. The Chief Justice was so close to Story and Washington that his letters to them closed with the word "affectionately."<sup>50</sup> Scholars have commented on the close relationship among the three, and, interestingly, when Justice Washington was ill during 1821, a contingent of Supreme Court Justices—Story, Todd, and Livingston—made the trip to Mount Vernon to visit him.<sup>51</sup>

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47. WHITE, *supra* note 12, at 349.

48. *Id.* at 173–74.

49. *Id.*; HASKINS & JOHNSON, *supra* note 23, at 628.

50. E.g., Letter from John Marshall to Bushrod Washington (July 12, 1823), in 9 MARSHALL PAPERS, *supra* note 23, at 332–34.

51. JOHNSON, *supra* note 16, at 24, 36, 37; 2 MARSHALL PAPERS, *supra* note 23, at 316 (involving Marshall witnessing a deed conveying title to "Belvidere" to Washington); 3 MARSHALL PAPERS, *supra* note 23, at 493–94 (reprinting Washington's address to citizens of Albemarle, on Marshall's return from the XYZ Mission); Letter from John Marshall to George C. Washington (Nov. 29, 1829), in 11 MARSHALL PAPERS, *supra* note 23, at 285 (quoting Marshall on death of Washington: "I had few friends who I valued so highly as your Uncle, or whose loss I should regret more sincerely.... We have been most intimate of friends for more than forty years, and never has our friendship sustained the slightest interruption."); see also Stoner, *supra* note 26, at 323 (quoting the eulogy of Washington by Story, "a tenderness of giving offense, and

Unquestionably, Justice Washington was a member of the inner circle of the Marshall Court. This was a group that provided both personal and judicial support to the Chief Justice, and it was also a cadre that discouraged dissent and the expression of individualistic opinions. Its influence and example provided additional support for Marshall's positions, and Washington's personality and friendship may well have drawn Justices Todd and Livingston into a larger group of the Chief Justice's supporters.

## II. BUSHROD WASHINGTON ON THE SUPREME COURT

A decade ago James Stoner made the astute observation that Justice Washington was an interesting transitional figure between the Jay-Ellsworth Court and its successor, the Marshall Court.<sup>52</sup> Because Washington left few papers behind and secondary works on the Justice are few, no scholar has yet taken up the challenge of analyzing this aspect of Washington's career. Certainly, it is not too speculative to suggest that Washington's low profile on the Marshall Court is due in part to his brief tenure on the earlier tribunal. The Ellsworth Court had been deeply troubled by its experiences in the years before Marshall's appointment in 1801. Its major constitutional decision in *Chisholm v. Georgia*, upholding the original jurisdiction of the U.S. Supreme Court over a debt collection action brought against the State of Georgia by a citizen of South Carolina, was promptly overruled by a constitutional amendment ratified less than two years later.<sup>53</sup> In the interim, Chief Justice John Jay was on an extended leave of absence in England where he was negotiating the Anglo-American treaty that bears his name. On Jay's return in 1795, he resigned from his leadership position on the Court to be elected governor of New York.<sup>54</sup> After William Cushing refused the nomination for Chief Justice and John Rutledge was denied confirmation by the Senate, Oliver Ellsworth of Connecticut served as Chief Justice for five years, two of

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yet a fearlessness of consequences, in his official character, . . . a rare combination, which added much to the dignity of the bench, and made justice itself, even when most severe, soften into the moderation of mercy".

52. Stoner, *supra* note 26, at 323; see also WHITE, *supra* note 12, at 350–51 (noting Justice Washington's easing the transition to the changes made by Marshall and leading the other Justices into the "opinion of the Court" through his own example).

53. 2 U.S. (2 Dall.) 419 (1793), superseded by U.S. CONST. amend XI. The Court's decision was reversed by the ratification of the Eleventh Amendment on February 7, 1795. See generally WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH, 188–203 (Herbert A. Johnson ed., 1995) (describing the case and its subsequent history).

54. CASTO, *supra* note 53, at 87–90.

which coincided with his service as a U.S. minister to the French Republic.<sup>55</sup> To make matters worse, the Supreme Court Justices' role on the circuit, trying prosecutions against leaders of the Fries uprising and the Whiskey Rebellion, aroused resentment toward the individual Justices and the Court as an institution. Bushrod Washington shared with his brethren the opprobrium associated with later trials of Jeffersonian-Republican newspaper editors convicted under the Sedition Act of 1798.<sup>56</sup> Fortunately for him, his innate sense of humility and kindness dissuaded him from behaving in an excessively harsh manner toward counsel and defendants in Sedition Act trials; even so, he may have witnessed the 1804 and 1805 impeachment and trial of Justice Samuel Chase with more than casual and disinterested attention.<sup>57</sup>

Joining the Supreme Court in 1798, Washington became heir to the growing docket of admiralty cases pending in the federal circuit courts and awaiting appeal to the Supreme Court.<sup>58</sup> While most of this litigation involved prize cases, it also provided the former Richmond lawyer with more familiarity with maritime law, international and foreign law, and the reasoning and procedures of civilian and continental jurisprudence. With this new knowledge, Washington became one of the Marshall Court's experts in these areas, which would serve him well after his 1802 assignment to the newly established federal circuit for Pennsylvania and New Jersey, where maritime law and international matters would occupy much of his time as Circuit Justice.<sup>59</sup>

#### *A. Bushrod Washington as Senior Associate Justice*

From 1811 until his death in 1829, Washington was the Senior Associate Justice of the Supreme Court. His early accession to the second most senior position on the Court was as abrupt as it was inevitable, given the advanced age of his colleagues.<sup>60</sup> William

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55. *Id.* at 118–19, 124.

56. See generally JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 159–87 (1956).

57. Although Bushrod Washington fully supported the enactment of the Alien and Sedition Acts, as a circuit justice he imposed moderate sentences on the newspaper editors involved in the five trials he conducted. In addition, his actions were seen to moderate prosecutorial zeal. Stoner, *supra* note 26, at 330–32.

58. JOHNSON, *supra* note 16, at 118–19.

59. Washington's contributions as a circuit justice are discussed at length beginning at *infra* Part III.

60. See Irving Dillard, *Samuel Chase*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 121, 134 (Leon Friedman & Fred L. Israel eds.,

Cushing of Massachusetts, one of President Washington's first appointees, died on September 13, 1810; nine months later Samuel Chase, riddled with gout, died at his home in Maryland.<sup>61</sup> Given the delicate health of both Justices prior to their deaths, it is quite probable that Bushrod Washington already had some experience presiding over the Court in the absence of Chief Justice Marshall and his more senior colleagues.

Strong circumstantial evidence suggests that seniority in the early Marshall Court, at least until the War of 1812, determined who delivered the opinions for the Court. In most cases it was the Chief Justice himself.<sup>62</sup> There is also a serious likelihood that the delivering Justice also wrote the opinion. After 1815 the seniority rule shifted to something more closely approximating its modern usage: the senior Justice representing either the majority or the minority would write and deliver the opinion or designate a colleague to write and deliver the opinion.<sup>63</sup> The statistics indicate that after 1820 Justices Washington, Story, Thompson, and Johnson shared in the delivery of the Court's opinions—a role that Washington seems to have assumed as early as 1809.<sup>64</sup> We may therefore speculate whether Justice Washington, given some of his jurisprudential positions to be discussed *supra*, became a mediating influence between the Chief Justice and his fellow associates. This conciliating function, coupled with Washington's seniority, could have moved him into a critically important role in the Marshall Court after 1815. Many issues polarized the Court during and after the War of 1812, but the complex questions of bankruptcy regulation constitute perhaps the best introduction both to Justice Washington's jurisprudence and to his differences from his friend, Chief Justice Marshall.

### B. The Bankruptcy Clause

The 1819 Term of the Supreme Court was marked by noteworthy progress toward strengthening the federal government's constitutional role within the American republic. *McCulloch v.*

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Chelsea House Publishers, 3d ed. 1997) [hereinafter THE JUSTICES OF THE UNITED STATES SUPREME COURT] (Justice Chase died in 1811); Herbert A. Johnson, *William Cushing*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT, *supra*, at 40, 54 (Justice Cushing died in 1810).

61. Dillard, *supra* note 60, at 134; Johnson, *supra* note 60, at 54.

62. JOHNSON, *supra* note 16, at 87–92.

63. HASKINS & JOHNSON, *supra* note 23, at 383–89; see also JOHNSON, *supra* note 16, at 87–92, 100–02 (examining the seniority phenomenon through the entire Marshall Chief Justiceship).

64. See JOHNSON, *supra* note 16, at 88–89 (presenting a chart providing the number of opinions annually of the Court by Justices from 1801 to 1835).

*Maryland* clarified the nature of federal supremacy, adopted a broad definition of the Necessary and Proper Clause, and began the task of delineating state and federal taxing powers.<sup>65</sup> *Dartmouth College v. Woodward*<sup>66</sup> continued the expansion of the Contracts Clause that had begun in *Fletcher v. Peck*<sup>67</sup> by including private corporate charters within the ambit of federal constitutional protection against state impairments of the obligations of contract.<sup>68</sup> However—and it was a big “however”—the bankruptcy cases<sup>69</sup> threatened to destroy the unanimity and magnanimity of the high Court. A deft and generally unsatisfactory compromise postponed the Court’s public embarrassments until 1827;<sup>70</sup> in the intervening seven years, Congress remained mired in the political quagmire of bankruptcy relief,<sup>71</sup> leaving the Court to its own devices and failing to enact a uniform law of bankruptcy, as authorized by the Constitution.

*Sturges v. Crowninshield* and *Ogden v. Saunders* bracket this important turning point in Supreme Court history. Economic distress in 1818 and 1819 focused public attention on the need for a nationwide bankruptcy provision or, failing that, the establishment of effective, state-based systems designed to relieve the financial difficulties of insolvent debtors. The public, in its desire for economic well-being, clamored for relief, regardless of whether the instrument of change was the Supreme Court, Congress, or the state legislatures.<sup>72</sup> Professor White stresses the unique nature of the public’s reaction to the 1819 decision in *Sturges*:

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65. 17 U.S. (4 Wheat.) 316 (1819).

66. 17 U.S. (4 Wheat.) 519 (1819).

67. 10 U.S. (6 Cranch) 87 (1810).

68. *Dartmouth Coll.*, 17 U.S. at 682–715.

69. The main opinion is *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819), coupled with a related case *McMillan v. McNeill*, 17 U.S. (4 Wheat.) 209 (1819).

70. The sharp differences of opinion in the *Sturges* case are exposed in Justice William Johnson’s *seriatim* opinion joining with the majority in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 272–73 (1819).

71. Some of the legislative and policy difficulties are explored in PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607–1900, at 271–86 (1974); *see also* WHITE, *supra* note 12, at 628–33, 636–37, 648 (referring to legislative debtor relief efforts, and suggesting that a marked change in the concept of property rights had occurred during these years). Congress’s two efforts at enacting a federal bankruptcy law were short-lived. The Act of April 4, 1800 was repealed on December 19, 1803, and the Act of August 19, 1841 was repealed on March 3, 1843. Herbert A. Johnson, *Federal Union, Property, and the Contract Clause: John Marshall’s Thought in Light of Sturges v. Crowninshield and Ogden v. Saunders*, in JOHN MARSHALL’S ACHIEVEMENT: LAW, POLITICS, AND CONSTITUTIONAL INTERPRETATIONS 33, 53 n.27 (Thomas C. Shevory ed., 1989).

72. MORGAN, *supra* note 2, at 117.

With *Sturges* a new direction of the commentary surfaced, the sense that the Supreme Court of the United States could have a direct effect on the affairs of citizens of every part of the nation. *Sturges* had come at a time when . . . American commerce had taken on an expansionist and increasingly interstate character, and in which the principle of negotiability had emerged from a localistic, two party setting to become a major mechanism of exchange.

The two cases also frame a period of rapid personnel change within the Court. The deaths of Marshall's valued colleagues Brockholst Livingston and Thomas Todd brought novel constitutional positions from newcomers Smith Thompson and Robert Trimble.<sup>73</sup> The intervening years also altered the preferences and positions among the veteran Justices who participated in *Ogden*.<sup>74</sup> It was in *Ogden* that these differences first became public, and the *seriatim* opinions highlighted a sharp confrontation between Bushrod Washington and the Chief Justice over the Contracts Clause's impact on state bankruptcy laws.<sup>75</sup> Despite Marshall's strong dissent in *Ogden*, the majority opinions left no doubt that thereafter the Contracts Clause would have a limited application for the first time in American constitutional history.<sup>76</sup> Had Marshall's position prevailed, it is possible that no state or federal debtor relief laws involving the discharge of obligations would have been constitutional.<sup>77</sup> Marshall and Washington found themselves on a collision course on the construction of the Contracts Clause, and neither was willing to defer to the other. As Charles Hobson observes about the Chief Justice, rather than taking the easier course of quietly acquiescing, Marshall strenuously dissented from the majority opinions. The fact "that he refused to [agree silently] . . . underscored his conviction that the Contract Clause, or rather the principle it embodied, contained the vital essence of the Constitution."<sup>78</sup>

In the evolution of constitutional law by the Marshall Court, *Sturges* and *Ogden* are perhaps best remembered as two decisions that halted the previously rapid broadening of the Contracts Clause.<sup>79</sup> However, in the process of deciding these cases, a number of complex but related issues also emerged. First and most obvious was the

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73. WHITE, *supra* note 12, at 304–05.

74. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 156 (1985); WHITE, *supra* note 12, at 305 (finding *Ogden v. Saunders* a turning point and the first time the Court sustained a state bankruptcy or insolvency law).

75. CURRIE, *supra* note 74, at 128.

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

77. CURRIE, *supra* note 74, at 156; WHITE, *supra* note 12, at 305.

78. HOBSON, *supra* note 7, at 107.

79. *Id.*

nature of Congress's bankruptcy power under the Constitution.<sup>80</sup> Was it an exclusive power, given that Congress was authorized to enact a "uniform" bankruptcy law? Or was it concurrent, given the historical record of insolvency and state debtor relief laws antecedent to ratification? Lurking in these questions was the fact that the Constitution did not expressly deny to states the power to enact bankruptcy laws. Additionally, there was the difficulty of conforming state bankruptcy provisions to the Contracts Clause's mandate that states not impair the obligation of contracts.<sup>81</sup> Did that require bankruptcy legislation to be prospective in operation? Further, once enacted, did the right to bankruptcy relief become a constitutionally guaranteed part of contracts even if the state subsequently repealed the law or enacted a substitute? This was as much a question of public law concerning the authority and capability of state legislatures as it was an issue of private rights against governmental action. And in 1819, there was a desperate need for some effective relief from one level of the government or the other as the nation slipped into the grip of the worst depression it had seen since its creation.

A final question was whether the protections of the Contracts Clause extended to guaranteeing remedies for breach, or if a valid distinction could be drawn between the "obligations" of contract, which would receive protection, and mere "remedies," which would not.<sup>82</sup> More specifically, was release from debtors' prison an interference with the obligation of a contract? Arguably, the coercive impact of imprisonment was a powerful incentive to perform a contract and may well have been one of the inducements for the creditor to enter into a contractual arrangement with the party who became delinquent. Arguably, such a remedy had an importance beyond mere procedural considerations, and thus was an integral part of the obligation of a contract. As such a significant aspect of the contracting process, the availability of debt imprisonment may well have been considered one of those obligations of a debtor that was to be protected under the Contracts Clause. More remotely, did retrospective usury laws that could not be anticipated by the contracting parties, or statutes of limitation that reduced a creditor's opportunity to sue on a preexisting contract, also so impair a critical element in the contract that they too were protected by the Contracts Clause?

Complicating these factors were difficulties of classifying contracts for conflicts of law determinations and identifying which

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80. *Ogden*, 25 U.S. at 264; *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

81. *Ogden*, 25 U.S. at 264; *Sturges*, 17 U.S. at 193.

82. *Ogden*, 25 U.S. at 259–60; *Sturges*, 17 U.S. at 199.

state statutes were applicable and which courts could exercise jurisdiction. While the place of contracting usually determined the applicable law, parties to the contract might have moved their businesses to another state, designated another state as the place of performance, or stipulated in their agreement that the law of a state other than the place of contracting would apply. There was concern that state statutes would not be given an extraterritorial operation or that courts exercising jurisdiction might not be the appropriate tribunals to determine cases. These considerations comprised a fourth factor grouped within an umbrella category of “federal concerns.” In addition, there was a question dating to colonial times: Was a discharge by the courts of one state a sufficient bar to a subsequent collection action brought in a sister state or colony?<sup>83</sup>

Finally, the Bankruptcy Clause problem raised issues that more recent constitutional theory would deem “dormancy” questions and preemption concerns.<sup>84</sup> When *Sturges* and *Ogden* came before the Supreme Court, there was no federal bankruptcy statute. Yet for a brief period from 1800 through 1803, there had been such a statute.<sup>85</sup> Did the subsequent repeal of the statute indicate congressional intent to enter the field? If not, did its repeal signify a willingness to allow state legislation to substitute for a federal enactment? Indeed, the 1800 statute had included a provision incorporating previously enacted state laws not in conflict with its provisions.<sup>86</sup> The Chief Justice in his 1824 opinion for the Court in *Gibbons v. Ogden* adroitly avoided dealing with the dormancy of the commerce power.<sup>87</sup> Thus, when *Ogden v. Saunders* was decided in 1827, it was still a matter of conjecture whether the Constitution’s grant of federal power in these vital economic areas precluded the states from legislating when Congress had not acted, or, in the case of the bankruptcy power, had

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83. HERBERT A. JOHNSON, JOHN JAY: COLONIAL LAWYER 118–19 (2006). Although both state bankruptcy statutes and debt relief under insolvency laws tended to be treated as *in rem* proceedings, as such they would not be binding beyond the jurisdiction. On the other hand, if an out of state creditor had actually appeared in the proceeding, *in personam* rules would preclude a subsequent action in another state.

84. Johnson, *supra* note 71, at 48.

85. Bankruptcy Act of 1800, ch. 19, 1 Stat. 19 (repealed 1803).

86. *Id.* ch. 19, § 61. State insolvency or bankruptcy proceedings below the jurisdiction amounts established by the Bankruptcy Act, or which were not “clearly within the purview of this act,” were to continue despite the enactment of the Bankruptcy Act. *Id.* In addition, in the case of an imprisoned debtor who after three months had not been proceeded against under the Bankruptcy Act, the debtor was to be given relief available to him or her under the insolvent debtor statutes. *Id.* In addition, state real property liens existing prior to the enactment of the Bankruptcy Act were not affected by the federal statute. *Id.* § 63.

87. 22 U.S. (9 Wheat.) 1, 76 (1824).

withdrawn from acting.<sup>88</sup> However, the majority opinions in *Ogden* accepted what might be considered a concurrency interpretation, permitting state legislation to operate until such time as Congress should act, or unless there was a clear conflict that violated the Supremacy Clause.

The Justices typically avoided asking questions for which they could not provide an answer or did not wish to answer. Drafted by a committee to which Marshall as a congressman had belonged, the 1800 Bankruptcy Act was a major piece of legislation that endeavored to provide a detailed foundation for the exercise of the uniform bankruptcy power authorized by the Constitution.<sup>89</sup> Given the strong Jeffersonian opposition to the 1800 legislation,<sup>90</sup> it is not surprising that it was repealed in 1803. On the other hand, the fact that Congress had legislated so carefully would suggest a congressional intent to occupy the field, and perhaps a wish to preclude parallel state legislation.<sup>91</sup> From 1803 to 1827, there were sporadic efforts to enact a replacement federal bankruptcy statute, and the failure to do so presented the Supreme Court with a problem of statesmanship: Could states not act in regards to insolvency and to discharge debtors

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88. Marshall's opinion for the Court in *Gibbons v. Ogden* adroitly avoided a holding that the commerce power was exclusive, and the 1827 opinions in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 254, 271 (1827) seem to have manifested a further step toward concurrence between federal and state powers. Johnson, *supra* note 71, at 48.

89. On Marshall's participation in this legislative drafting, see 4 MARSHALL PAPERS, *supra* note 23, at 34, 38, 52; see also Johnson, *supra* note 71, at 35–36 (describing not only this legislative activity, but also Marshall's personal and professional experience with insolvent debtors).

90. See CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 16 (1935) (describing Jefferson's objections to a national bankruptcy system as an attempt to protect land from creditors).

91. This aspect of constitutional law has come to be known as the preemption doctrine. See, e.g., 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1172 (3d ed. 2000) (describing the preemption doctrine). Preemption arises when state legislation comes into apparent conflict with congressional acts covering the same subject matter. See *id.* (discussing preemption of "conflicting state or local action"). Under the Constitution's Supremacy Clause, many of these cases can be resolved quickly, but in areas where federal and state powers may be concurrent, complications can arise that require the application of the preemption doctrine. Simply put, federal legislation will prevail if: (1) Congress expressly provided for its superseding state laws; or (2) the field of legislation is covered so thoroughly by the federal law that we may assume Congress did not intend to allow it to be supplemented or augmented by state legislation. See *id.* (discussing both cases of preemption). Against this background, the repealed 1800 Bankruptcy Act presents a unique theoretical issue. Did Congress's intention to "occupy the field" of insolvency and bankruptcy so dominate the federal-state power balance in this area that it precluded state legislation even after the 1800 Act's repeal? Given the desperate need for legislation, and the failure of Congress to pass a subsequent bankruptcy statute, it would seem likely that the Justices chose to ignore this question, thereby leaving open the possibility of co-existing federal and state bankruptcy and insolvency remedies. For a thorough discussion of these preemption issues, see generally *id.* at 1172–1212.

until federal legislation made relief available? This concession to continuing state power was present in the 1800 Act, which provided that the federal statute did not displace existing state legislation unless there was a conflict between the Bankruptcy Act and preexisting state legislation.<sup>92</sup>

In the first of the major bankruptcy cases, *Sturges*, the Supreme Court was probably divided over whether the Constitution conferred exclusive bankruptcy authority upon the federal government.<sup>93</sup> Arguing for Sturgis the insolvent, Joseph Hopkinson touched upon all of the issues mentioned above, but also made the telling economic point that since most trading activity took place across state lines, the existence of a state-based discharge system raised a plethora of concerns.<sup>94</sup>

Five years prior to the *Sturges* decision, Justice Washington announced his view in *Golden v. Prince* that the Constitution created an exclusive bankruptcy power in the federal government.<sup>95</sup> He reasoned that the grant of a power to the federal government without any mention of the states suggested that the grant was complete and therefore exclusive.<sup>96</sup> In addition, the concept of a uniform bankruptcy system logically demanded a single regulation applicable throughout the Union; such a system necessarily depended on congressional action and an exclusive constitutional grant of power for that purpose.<sup>97</sup> Finally, he suggested that it would be incorrect to restore to the states, by implication, a power that the Constitution specifically assigned to the federal government.<sup>98</sup> The parallel inclusion of the naturalization and bankruptcy provisions in the same constitutional section added weight to the view that in both areas a concurrent power would violate the framers' intent.<sup>99</sup> Apparently, Washington's

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92. See Johnson, *supra* note 71, at 43 (noting that when Congress "briefly executed the terms of the bankruptcy law of 1800, Congress provided that the federal statute should not be considered a revocation of existing or future state insolvency laws"); see also WHITE, *supra* note 12, at 637 (noting that in *Sturges*, the Court held that until Congress acted the states might enact bankruptcy statutes, provided they did not violate the Federal Contracts Clause).

93. 17 U.S. (4 Wheat.) 122 (1819).

94. *Id.* at 180.

95. *Golden v. Prince*, 10 F. Cas. 542, 544–45 (C.C.D. Pa. 1814) (No. 5509).

96. *Id.* at 545.

97. *Id.* at 544–45.

98. See *id.* at 545 (commenting that "[t]his doctrine appears to us to be as extravagant as it is novel").

99. See *id.* at 546 (finding "[t]he subject of naturalization . . . strongly illustrative" and noting that "[t]he power to pass laws upon [naturalization], is found in the same section, and is expressed in words of the same import, with that respecting bankruptcies"); CURRIE, *supra* note 74, at 148 (noting the Court's similar treatment of naturalization and bankruptcy); Stoner, *supra* note 26, at 338 (commenting that Washington's interpretation of the scope of the bankruptcy

opinion in *Golden* created doubt in John Marshall's mind concerning exclusivity. On April 19, 1814, he responded to Washington's inquiry on the subject, observing: "I had taken it for granted that the power of passing bankruptcy laws resided in the states. It now appears to me more doubtful."<sup>100</sup> Marshall's ambivalence may well have been typical of the rest of his colleagues. Justice Brockholst Livingston in the New York Circuit Court considered a state insolvency law to be concurrent, as did Justice Joseph Story in the Massachusetts Circuit Court.<sup>101</sup> Thus, even before *Sturges* reached the Court, there were sharp and well-documented differences of opinion on the exclusivity issue.<sup>102</sup>

Although the comment was certainly not essential to the narrow basis of the decision in *Sturges*, it is quite clear from Marshall's opinion that he, and presumably a majority of the Court, had arrived at a consensus that states might legislate in the bankruptcy field as long as the constitutional requirements of the Contracts Clause were met. To quote the Chief Justice:

It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach.... If, in the opinion of congress, uniform laws concerning bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject matter must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the states.<sup>103</sup>

Marshall's summary for the Court evidenced a willingness to deal with congressional inaction in a pragmatic way. It was acceptable to view a failure to enact a uniform law as evidence that Congress

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power was based in part on a "close reading of the text," including the fact that the bankruptcy power is "coupled with the naturalization power".

100. Letter from John Marshall to Bushrod Washington (Apr. 19, 1814), in 8 MARSHALL PAPERS, *supra* note 23, at 34; see also Stoner, *supra* note 26, at 337 (suggesting that the decision in *Golden* launched a growing division between Washington and Marshall in the area of bankruptcy and insolvency). That possibly is the case, but the Chief Justice's letter continues: "But unless Congress shall act on the subject, I should feel much difficulty in saying that the legislative power of the states respecting it is suspended by this part of the constitution." Letter from John Marshall to Bushrod Washington (Apr. 19, 1814), in 8 MARSHALL PAPERS, *supra* note 23, at 34.

101. Adams v. Storey, 1 Fed. Cas. 141, 143–44 (C.C.D. N.Y. 1817) (No. 66).

102. See CURRIE, *supra* note 74, at 150 (remarking that "there is extrinsic evidence" that neither Livingston nor Washington "was persuaded to abandon their positions," despite not dissenting in *Sturges*); MORGAN, *supra* note 2, at 242 (noting the "two rival theories" on how to resolve conflicts over bankruptcy laws); WHITE, *supra* note 12, at 634 (noting that, even before *Sturges* was heard, "the Justices differed deeply"); Johnson, *supra* note 71, at 48 (describing the *Sturges* opinion as a compromise between two different forms of jurisprudence).

103. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 195–96 (1819). The comment raises some interesting questions about Marshall's attitude toward dormancy, something he evaded deftly in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

preferred to pass a partial law. In addition, the mere existence of a constitutional power to regulate commerce, absent any congressional exercise of that power, did not invalidate inconsistent state legislation. Certainly this rather flexible approach contrasts sharply with Bushrod Washington's strong sentiment that exclusivity in appropriate cases would avoid subsequent judicial difficulties. While he was willing to accept a contrary view in *Ogden v. Saunders*, Washington's quest for certainty via an exclusive classification rather than flexibility in practice was obvious.<sup>104</sup>

Conflicts of law issues blunted state-based efforts to afford relief to embarrassed debtors. In the Pennsylvania circuit, Justice Washington insisted in *Green v. Sarmiento* that the law of the place where a contract was executed would control both the substance of the contract and its discharge.<sup>105</sup> Concerning the enforcement of a French bankruptcy decree, he observed that "[t]he laws of one country, can have in themselves no extraterritorial force, except so far as the comity of other nations may extend to give them effect . . .".<sup>106</sup> On the other hand, he asserted elsewhere in *Sarmiento* that the Federal Constitution's Full, Faith and Credit Clause required that each state treat the judgments and decrees of a sister state as having the same impact within the forum state as they would in the state where judgment had been entered.<sup>107</sup> Therefore, he was willing to enforce a debt collection judgment of a New York state court, despite the fact that the defendant had been awarded a Pennsylvania discharge in bankruptcy.<sup>108</sup> In *Riston v. Content*, however, Washington refused to accept the defense of discharge under the Pennsylvania insolvency law.<sup>109</sup> In his view, the contract was entered into in Maryland, and while the promissory note was executed in Philadelphia, there was no reason to believe that it was payable in that city.<sup>110</sup> Washington's view of conflicts questions in 1819 accorded with that held by the Chief Justice, who wrote to him that "a contract is made with a knowledge that it may be acted on by the law. But this would not apply to

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104. See 25 U.S. (12 Wheat.) 213, 263–64 (1827) (submitting to the Court's decision in *Sturges*, but finding the power to pass bankruptcy laws as exclusively reserved to the federal legislature); see also MORGAN, *supra* note 2, at 248 (speculating that, in *Ogden*, Justice Washington "cast a longing backward glance at the rule of exclusiveness he had broached so long before").

105. 10 F. Cas. 1117, 1117 (C.C.D. Pa. 1810) (No. 5760).

106. *Id.* Washington's view of comity appears to have been sharply influenced by the activities of French prize courts, which he considered violations of international law.

107. *Id.* at 1119–20.

108. *Id.* at 1118–20.

109. 20 F. Cas. 840, 841 (C.C.D. Pa. 1824) (No. 11,862).

110. *Id.*

contracts made out of the state.”<sup>111</sup> In other words, both Justices assumed that the place in which a contract was executed would also provide the legal background against which the contract would be construed and the remedies for enforcement or damages for breach. The place of contracting was of paramount significance, and after *Sturges*, it was determinative.<sup>112</sup> In *Sturges*, the place of contracting was New York, and the statute authorizing discharge was a New York law. In the companion case of *M'Millan v. M'Neill*, the jurisdictions awarding the discharges were not the states in which the debt had been incurred, and thus the discharges were not valid within the jurisdictions where the debt were contracted.<sup>113</sup>

However, the most striking evidence of the differences between Marshall and Washington became patent in *Ogden v. Saunders*, decided in 1827.<sup>114</sup> In his *Ogden* dissent, the Chief Justice seemingly departed from any attempt to reconcile state regulatory legislation with the consensual nature of contracting.<sup>115</sup> He asserted instead that the right to contract existed by natural law and was superior to any governmental efforts to restrain or limit the exercise of that right.<sup>116</sup> As the editors of the Chief Justice’s papers note: “No other opinion better reveals the extent to which natural law principles informed his constitutional jurisprudence.”<sup>117</sup> On behalf of the creditors in *Ogden*, Henry Wheaton had argued that contracts were derived not only from municipal law but also “from a higher source; from those great principles of universal law, which are binding on societies as well as individuals.”<sup>118</sup> Adopting this position, enhancing the excessive natural law position within it, and incorporating Daniel Webster’s similar argument, the Chief Justice elevated this natural right to

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111. Letter from John Marshall to Bushrod Washington (Apr. 19, 1819), in 8 MARSHALL PAPERS, *supra* note 23, at 35.

112. See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 122–23 (1819) (examining the New York insolvency law as applied to a contract formed in New York).

113. 17 U.S. (4 Wheat.) 209, 212–13 (1819); see also Johnson, *supra* note 71, at 42–43 (noting that, in *M'Millan*, the bond was issued in South Carolina and the debtor secured a discharge in Louisiana). Of course, a creditor’s appearance in a state bankruptcy proceeding would bar his subsequent action in both that state and in any other state, regardless of the original situs of contracting.

114. 25 U.S. (12 Wheat.) 213 (1827).

115. See *id.* at 346 (remarking that “individuals do not derive from government their right to contract, but bring that right with them into society”).

116. See *id.* (noting that, “in a state of nature,” individuals have the right to contract, and surrender it upon entering society only so that “government may give it back again”).

117. 10 MARSHALL PAPERS, *supra* note 23, at 354.

118. 25 U.S. at 222; see also 10 MARSHALL PAPERS, *supra* note 23, at 352, editorial cmt. (discussing Wheaton’s natural law argument); Johnson, *supra* note 71, at 43 (discussing Wheaton’s arguments).

contract above all but the most essential state law limitations, such as statutes prohibiting usury and evidentiary statutes of frauds.<sup>119</sup> To further emphasize the independent and preeminent natural law right to contract freely, as well as Contracts Clause limitations upon state authority, Marshall concluded:

In all these cases, whether the thing prohibited be the exercise of mere political power, or legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of every description is comprehended within it. A State is as entirely forbidden to pass laws impairing the obligation of contracts, as to make treaties, or coin money.<sup>120</sup>

This extraordinary claim for a sweeping and fundamental natural right to contract was vehemently rejected by Bushrod Washington and his colleagues in the *Ogden* majority.<sup>121</sup>

Washington's main criticism of Marshall's dissenting opinion centered on the Chief Justice's contention that contract was a natural right which, standing alone, invalidated any state efforts to limit the obligation of contracts.<sup>122</sup> Conceding that a natural law right to contract existed in international law by virtue of "the common law of nations," Washington distinguished such public undertakings from agreements made by private individuals.<sup>123</sup> Private contracts were not mere moral commitments; they were binding legal obligations between

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119. See Johnson, *supra* note 71, at 46 (commenting that, according to Marshall, the right to contract "was a right based on the law of nature, and no legislative act could impose upon a contract conditions not agreed to by the parties"). David Currie comments that Marshall "seemed to flirt with the idea that the Constitution protected agreements whether or not they were recognized by state law," and that this view was not unlike that which later generations would attach to the concept of "freedom of contract" under the Due Process Clauses. CURRIE, *supra* note 74, at 152. Professor White notes that "positivist conceptions of law, emphasizing that written legislative or judicial acts created and defined the full scope of human rights and responsibilities, had not . . . fully displaced natural law conceptions in jurisprudential discourse," and that the right to acquire property in Marshall's view was unique and intrinsic. WHITE, *supra* note 12, at 305–06 ("In *Sturges v. Crowninshield*, the Court had already held that debtor relief laws could not constitutionally affect obligations incurred before their passage."). White also suggests that Marshall had approached this position in the *Sturges* opinion. *Id.* at 305 (citing *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819)).

120. *Ogden*, 25 U.S. at 335.

121. *Id.* at 258–59 (rejecting both the moral law and the universal law—that "all men are bound to perform their contracts"—as the basis of the obligation of contracts, and accepting the "municipal law of the State").

122. See *id.* at 258 (rejecting the view that the states would have consented to a constitutional principle of contract that would have abridged the States' legislative power over contracts).

123. *Id.* at 259:

Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist, that this is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed.

individuals, and the enforcement of those rights and responsibilities fell within the authority of the state in which the contract was made. These private contracts were subject to municipal law as well; indeed, there were “few laws which concern the general police of a state, or the government of its citizens, in their intercourse with each other, or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form.”<sup>124</sup> Whenever positive laws of the place of contracting conflicted with the common law of nations—that is, natural law—the local municipal law would govern.<sup>125</sup> Should the parties contractually stipulate that another state’s law should govern, that chosen state’s law would normally apply under principles of comity, unless some public policy of the forum state precluded enforcement.<sup>126</sup>

Although the 1819 *Sturges* precedent rested on the unconstitutionality of a retrospective state bankruptcy law, Washington pointed out in *Ogden* that the date of the law’s enactment had nothing to do with its impact upon contracts. He had already conceded that virtually every state law had the potential to impair private contracts.<sup>127</sup> Although the parties might claim that only laws existing at the time of contracting should be incorporated within the extrinsic conditions of contracting, they might reasonably anticipate that their contract could be affected by subsequent positive law. Washington went one step further, suggesting that each state might enact a broad statute that reserved to the legislature the power to change the law governing the discharge of contracts, regardless of the time of the contract’s execution or the date of the statute’s enactment.<sup>128</sup>

Finally, after strongly restating his belief that the bankruptcy power was exclusively committed to Congress, Washington bowed to the contrary views of his colleagues on the bench and accepted their position that the bankruptcy power was concurrent in the federal and state governments.<sup>129</sup> However, he also reiterated his belief that

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124. *Id.* at 258–59.

125. *Id.* at 260–61.

126. *Id.* at 259–60.

127. See *id.* at 259 (mentioning “the laws of evidence,” or laws “which concern remedies—frauds and perjuries—laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern keepers, and multitude of others” as potentially impairing private contracts).

128. See *id.* at 267 (“Nor can it be unjust, or oppressive, to declare by law, that contracts subsequently entered into, may be discharged in a way different from that which the parties have provided . . .”).

129. See *id.* at 270 (giving the “decent respect due” to state bankruptcy laws and recognizing that “[t]his has always been the language of this Court”).

respect for the wisdom, integrity, and patriotism of state legislatures required him to “presume in favour of [the] validity [of their legislation] until its violation of the constitution is proved beyond all reasonable doubt.”<sup>130</sup>

Rarely were the differences between Washington and Marshall so starkly demonstrated as they were in *Ogden v. Saunders*. Professor White, perhaps taking his cue from Richard Hofstadter’s analysis of property rights in Jacksonian America,<sup>131</sup> elaborates on this point by suggesting that the *Ogden* Court’s alternatives, like those in the 1823 occupying claimant case *Green v. Biddle*,<sup>132</sup> involved choices between two types of property rights. One category concerned the rights inherent in strict adherence to preexisting contractual arrangements; the other was the natural justice and practical utility of protecting those who produced economic and social benefits through their enterprises but lacked a legal claim with which to protect themselves or the value of the efforts they invested in their property.<sup>133</sup> A brief review of Bushrod Washington’s work on circuit suggests that his views of property rights, legislative power, and the legal needs of commercial activity are partially responsible for his divergence from the position taken in *Ogden* by the Chief Justice.<sup>134</sup>

American economic thought began to alter its understanding of property perhaps as early as 1800 and certainly after 1819 and the Missouri Compromise of 1820. Earlier, Thomas Jefferson and virtually all of his contemporaries had viewed commercial activity as a necessary adjunct to, or handmaiden of, agriculture. More importantly, as Joseph Dorfman suggested, “It is only those men who have attained a modicum of economic independence and welfare—that is to say property—who can rise to their rational task in a republican

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130. *Id.* This is a paraphrase of the principle that Professor White terms the “reasonable doubt rule,” citing *id.* at 295.

131. See RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 51–52, 56–57, 67 (Vintage Books 1954) (1949) (arguing that Jackson and his followers favored property laws that encouraged entrepreneurial-risk capital, rather than an economic system favoring static wealth and underutilization of assets).

132. 21 U.S. (8 Wheat.) 1, 69–94 (1823). The 1823 opinion of the Court, delivered by Bushrod Washington, was designed to soften the abrupt tone of Justice Story’s 1821 pronouncement. See WHITE, *supra* note 12, at 645 (commenting that Washington’s opinion “appeared to be a self-conscious correction of some of the deficiencies in Story’s earlier effort,” and that “Washington also took pains to communicate his sensitivity to the political consequences of the Court’s interference with Kentucky land claims”).

133. See WHITE, *supra* note 12, at 651 (noting that *Ogden v. Saunders* was “virtually unique”); see also Stoner, *supra* note 26, at 340 (contrasting the views of Marshall and Washington).

134. See *infra* note 140 and accompanying text.

society."<sup>135</sup> However, even Jefferson recognized that the independent and diverse needs of commerce after the turn of the century began to exert demands upon the legal system, and occasionally commerce tended to dominate agricultural activity.<sup>136</sup> Although ready access to property democratized the earlier process of joining an electoral franchise through the acquisition of realty, the 1819 depression began to cast doubt upon the inevitability of a man's rise to riches, and the protective cushion of debtor relief became more attractive to a new generation of entrepreneurs. The protective tariff proposals pending in Congress between 1819 and 1821 were sharply criticized by John Taylor of Caroline,<sup>137</sup> who in *Tyranny Unmasked* asserted that any such governmental interference constituted a violation of the natural right to engage in commerce.<sup>138</sup> In addition, protectionism obstructed freewill exchanges of goods and substituted extortion of profits by the government or those to whom the state granted exclusive privileges.<sup>139</sup> Finally, as Taylor's objection to the slavery provisions of the Missouri Compromise highlighted, restrictions that dealt with slavery were seen as but the first step toward new governmental usurpations of personal liberty and property. Dorfman comments that Taylor was so heated on the subject that "he came forth with the most rigid defense of property, a defense that denied even to the states themselves any right to 'interfere' with 'property,' and of course slaves were property."<sup>140</sup> Economic, social, and political influences each played a part in moving Americans away from a profound respect for static vested property rights to a more relativist position, which was increasingly tolerant of public limitations on private property rights that facilitated commercial and industrial activity in a rapidly diversifying economy.

It is against this shifting political theory that the differences between Marshall and Washington ought to be examined. Specifically, it is notable that the Chief Justice's circuit covered the agrarian states

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135. 1 JOSEPH DORFMAN, THE ECONOMIC MIND IN AMERICAN CIVILIZATION 1606-1865, at 445 (1946).

136. *See id.* at 446 (noting Jefferson's concern that state "[l]egislators were prone to infection with an overdose of 'patriotism,' especially when it coincided with the immediate pecuniary interests of members").

137. Taylor, perhaps the foremost advocate for states' rights in Virginia, was traditionally identified by the name of his plantation, Caroline.

138. DORFMAN, *supra* note 135, at 388-89. For a fuller discussion of Taylor's advocacy of laissez faire economics and his attack on the protective tariff, see EUGENE T. MUDGE, THE SOCIAL PHILOSOPHY OF JOHN TAYLOR OF CAROLINE: A STUDY IN JEFFERSONIAN DEMOCRACY 161-68, 186-91 (1939).

139. DORFMAN, *supra* note 135, at 388-89.

140. *Id.* at 402.

of Virginia and North Carolina, while Washington's circuit encompassed the more commercial and industrial areas of Pennsylvania and New Jersey. Washington's judicial attention inevitably involved real property and public land cases, but commercial law, admiralty litigation, and the administration of marine insurance dominated his trial dockets.<sup>141</sup> In addition, his extended residence in Philadelphia during circuit court terms placed him in the commercial, financial, and industrial heart of the United States and provided him with additional proof that the law needed to move from a rigid support for vested property rights toward a humanitarian bankruptcy system that would provide both debt relief and rehabilitation through state or federal legislation.

### C. Green v. Biddle, *Federalism, and Legislative Power*

*Green v. Biddle*<sup>142</sup> reminds us that natural law doctrine was a matter of discussion in the Supreme Court some four years before Chief Justice Marshall's dissenting opinion in *Ogden*. Because Marshall and his family were deeply involved in Kentucky land transactions,<sup>143</sup> the final opinion in the case was assigned to Bushrod Washington, partly to assuage public criticism of the terse 1821 opinion in *Green* written two years earlier by Justice Story.<sup>144</sup> *Green* involved a Contracts Clause challenge to the occupying claimant laws

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141. JOHNSON, *supra* note 16, at 118 (showing the number of cases within each category that Washington heard while on the Supreme Court, and the number of cases within each category that Washington heard while on the circuit court). Compare *id.* app. A at 273 (showing the number of cases within each category in Pennsylvania from 1801 to 1835), and *id.* app. B at 280–81 (showing the number of cases within each category that Marshall heard on the circuit court from 1802 to 1833 and the number of cases within each category that Marshall heard on the Supreme Court from 1801 to 1835), with *id.* app. A at 277 (showing the number of cases within each category in Virginia from 1802 to 1833), and *id.* app. B at 290–91 (showing the number of cases within each category that Washington heard on the circuit court from 1803 to 1829 and the number of cases within each category that Washington heard while on the Supreme Court from 1806 to 1829).

142. See, e.g., *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 83 (1823) (discussing the “maxim of equality, and of natural law, *nemo debet locupletari aliena jactura*”).

143. See 1 MARSHALL PAPERS, *supra* note 23, at 100–04 (discussing Marshall's Kentucky land speculation); see also HASKINS & JOHNSON, *supra* note 23, at 590 (noting that “[b]eyond the substantial earnings of his law practice, the bulk of the Chief Justice's estate may be said to derive from wise and circumspect investments in undeveloped lands”); R. KENT NEWMAYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 16–17 (2001) (pointing out that the Marshall family's land acquisitions had the goal not of accumulating land, but rather increasing family wealth through speculation in land grants).

144. See *supra* note 132. Marshall declined to sit in the case, and hence his modifying influence was not present at the 1821 deliberations. Justice Washington was absent the entire 1821 Term. WHITE, *supra* note 12, at 373, 643.

of the Commonwealth of Kentucky.<sup>145</sup> These state statutes were enacted to provide an equitable system for adjusting claims to Kentucky land between nonresident grantees and individuals who had long resided upon and improved the land parcels.<sup>146</sup> The 1792 compact between Virginia and the future state of Kentucky provided: “[A]ll private rights and interests of lands, within the said District [Kentucky], derived from the laws of Virginia [prior to such separation], shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State [Virginia].”<sup>147</sup> Congress approved the compact, as required by the Constitution, and Kentucky was duly admitted to the Union. In 1797 and again in 1812, the Kentucky legislature enacted legislation that protected the financial interests of, and improvements made by, the so-called “occupying claimant” residents of Kentucky.<sup>148</sup> These statutes provided relief from the common law rule that improvements to realty made by tenants or unauthorized squatters reverted to the legal owner of the land at the end of the lease, or when the parcel was recovered by an ejection action.<sup>149</sup> Counsel for the holders of Virginia legal titles challenged the statutes as unconstitutional state laws impairing the obligation of contracts.<sup>150</sup>

Counsel for the title holders argued before the Supreme Court in the 1821 Term, but counsel for the occupying claimants made no appearance.<sup>151</sup> Justice Story’s terse opinion for the Court invalidated the Kentucky statutes because they violated the Contracts Clause and also violated the Virginia-Kentucky compact that formed a part of the state constitution.<sup>152</sup> The Story opinion’s brevity as well as its failure to include citations drew public ire, as did the fact that the occupying claimants under the Kentucky statutes were not represented at oral argument.<sup>153</sup> On the motion of Henry Clay, a former law clerk in

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145. 21 U.S. at 11.

146. *Id.* at 11–12.

147. *Id.* at 11.

148. *Id.* at 11–12.

149. See *id.* at 70–77 (describing the statutory provisions and common law rules).

150. *Id.* at 3.

151. *Id.* at 1.

152. *Id.* at 13, 15–16. Story pointedly rejected the contention that the changes in state law were simply alterations in the remedy afforded to contract holders. See also *id.* at 17 (“If those acts so change the nature and extent of existing remedies, as materially to impair the rights and interests of the owner, they are just as much a violation of the compact, as if they directly overthrown his rights and interests.”).

153. See WHITE, *supra* note 12, at 642–44 (discussing the controversy that resulted from Story’s opinion); see also JOHNSON, *supra* note 16, at 79–80 (suggesting that the Court’s

Justice Washington's law practice, the Court withheld Story's opinion and scheduled the case for reargument.<sup>154</sup>

Although Justice Washington reached the same conclusion as Story after reargument, his opinion is considered a "self-conscious correction of some of the deficiencies of Story's earlier effort."<sup>155</sup> In addition, as Professor White suggests, Washington was sensitive to the fact that the Court was interfering with a state's attempt to protect its own residents. Although this task was accomplished in the absence of Justice Thomas Todd, the Court's specialist on the complexities of Kentucky real property law,<sup>156</sup> Washington's purported lack of familiarity with Kentucky land law was partially compensated for by his references to natural and civil law principles in support of the sanctity of titles to real property, and the resultant rights of the successful claimants to demand an account for the mesne profits that had accrued to the occupying tenants.<sup>157</sup> This was but the beginning of an effort to consider the Interstate Compact Clause as a decisive factor in deciding the case; indeed, the inclusion of both constitutional provisions in Section 10 of Article I of the Constitution suggests that the Compact Clause was not originally intended to be governed by the Contracts Clause.<sup>158</sup> Natural law principles would have been persuasive precedents had the Court wished to consider the Kentucky-Virginia compact as between two distinct sovereign entities. Without conceding the sovereignty of the states, and without denying that the Contracts Clause applied to interstate compacts, Washington nevertheless deftly implied in his opinion that natural and civil law<sup>159</sup>

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disposition of *Green v. Biddle* polarized the states' rights opposition to the jurisdiction of the U.S. Supreme Court).

154. *Green*, 21 U.S. at 17–18. Professor White stresses the brevity and inadequate citations in Story's opinion as two causes for public dissatisfaction; in addition, Story had ignored the question whether the operation of the Compact Clause was governed by the Contracts Clause. WHITE, *supra* note 12, at 643–45.

155. WHITE, *supra* note 12, at 645.

156. See *id.* at 319–20 (discussing Todd's knowledge of Kentucky land law and the role it played on the Court and noting that both Marshall and Washington "needed Todd's advice in threading their way through the unfamiliar complexities of Kentucky land law").

157. *Green*, 21 U.S. at 77–81.

158. WHITE, *supra* note 12, at 645.

159. Contemporary American use of civil law sources seems to have relied most commonly upon the *ius commune*; this was the generally accepted pre-Napoleonic law of continental Europe, based to a large degree upon usages drawn from Justinian's *Digest*. Bushrod Washington and his contemporaries would have become acquainted with Roman law in connection with their classical studies, and Washington's training with James Wilson, a graduate of St. Andrews University in Scotland, would have deepened his knowledge of Roman law and the Justinian corpus. See Kermit L. Hall, *Introduction* to 1 COLLECTED WORKS OF JAMES WILSON xiii, xv–xviii (Kermit L. Hall & Mark D. Hall eds., 2007); 1 THE WORKS OF JAMES WILSON 7–10 (Robert G. McCloskey ed., 1967) (discussing Wilson's education).

principles would also support the unconstitutionality of the Kentucky occupying claimant statutes.<sup>160</sup> A more forceful argument based on natural law might well have forced the Court to open the door to a dangerous threat to limited government: could an interstate compact, accepted by Congress, unite federal and state sovereignty in such a way that the Constitution itself could be circumvented?<sup>161</sup>

The safest route—indeed the judicious route—was to subsume the Compact Clause within the Contracts Clause, as Justice Washington did by asserting that “the constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a State and individuals; and that a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals.”<sup>162</sup> Four short years later, he would draw back from Marshall’s defense of contract as a natural right that could not be altered by any legislative action.<sup>163</sup> Perhaps at that later time, Washington recalled Justice William Johnson’s dissent in *Green*:

I cannot admit, that it was ever the intention of the framers of this constitution, or of the parties to this compact, or of the United States, in sanctioning that compact, that Kentucky should be for ever chained down in a state of hopeless imbecility—embarrassed with a thousand minute discriminations drawn from the common law, refinements on mesne profits, set-offs, etc. appropriate to a state of society, and a state of property, having no analogy whatever to the actual state of things in Kentucky—and yet, no power on earth existing to repeal or to alter, or to effect those accommodations to the ever varying state of human things, which the necessities or improvements of society may require.<sup>164</sup>

Things were changing rapidly in the 1820s, not only in new concepts of property rights, but also in the recognition of the need for flexibility in constitutional construction. Johnson understood these changes in 1823; it took the Federalist Bushrod Washington another four years to understand that societal need should play a more formative role in constitutional construction.<sup>165</sup>

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160. *Green*, 21 U.S. at 78, 81.

161. White suggests that the compact theory of government—that in joining the federal union the states had not surrendered their sovereignty—had been argued to the Court in *Green*, but apparently was rejected by the Court. See WHITE, *supra* note 12, at 281 (noting that the compact theory had been “vigorously argued by critics of *Green v. Biddle*”).

162. *Green*, 21 U.S. at 92.

163. See *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 270 (1827) (holding that a state law restricting the right to contract was constitutional until proven otherwise “beyond all reasonable doubt”).

164. *Green*, 21 U.S. at 104.

165. See Herbert A. Johnson, *The Constitutional Thought of William Johnson*, 89 S.C. HIST. MAG. 132, 145 (1988) (claiming that Johnson saw society and human relationships as formative influences in shaping law, while Marshall pictured law as shaping society).

*D. International Law*

Bushrod Washington's three decades on the Supreme Court were marked by a persistent demand to apply international law, as required by the treaties entered into by the United States and supplemented by the customary law of nations. Because Philadelphia remained the de facto diplomatic capital of the new nation until well after 1820, Washington was directly involved in the inevitable clashes between foreign ministers and their American neighbors. His experience ranged the gamut of cases, from critical issues in international affairs to gritty tort litigation arising from fisticuffs in the back alleys of the city of not-too-brotherly love.

Undoubtedly, Justice Washington's most important international law opinion on the Supreme Court was in *Smith v. Maryland*.<sup>166</sup> On the merits, this was a straightforward decision. The 1780 wartime forfeiture statute enacted by Maryland provided for the general seizure of all Maryland realty owned by British subjects, and the Supreme Court held that since no additional state action was required to vest title in the state, the 1783 peace treaty and the 1794 Jay Treaty did not protect the title of William Smith.<sup>167</sup> Specifically, the treaties covered "future confiscations" of American realty and thus were effective only for those British owners who held legal or equitable title after September 3, 1783.<sup>168</sup> What was significant in *Smith* was not the resolution of the substantive question; quite the contrary, it was the fact that the Supreme Court took it upon itself to reexamine the correctness of the Maryland Court of Appeals's construction of the 1780 state statute.<sup>169</sup> At oral argument, counsel debated the impact of Section 34 of the 1789 Judiciary Act, which might be construed to require the Supreme Court to accept the Maryland Court of Appeals's view of the state statute.<sup>170</sup> In his *Smith* opinion, Washington virtually ignored the suggestion that state courts could bind the Supreme Court's exercise of "federal question" jurisdiction through resolution of state law questions that were critical to the exercise of federal jurisdiction.<sup>171</sup> As Justice William Johnson would subsequently point out in *Fairfax's Devisee v. Hunter's Lessee*, shackling the Supreme Court to state law decisions in treaty

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166. 10 U.S. (6 Cranch) 286, 304–06 (1810).

167. *Id.* at 288, 304–06.

168. *Id.* at 304, 306.

169. *Id.* at 305–06.

170. *Id.* at 297, 302, 304. Justice Washington simply noted the issue in passing and then proceeded to construe de novo the Maryland statute. *Id.* at 304.

171. *See id.* at 304–05 (failing to examine the Maryland court's construction of the law).

interpretation cases would render an appeal to the Court "worse than nugatory."<sup>172</sup> Justice Washington's jurisdictional decision in *Smith* was thus a recognition of the view taken more directly and persuasively by Justice Story in *Martin v. Hunter's Lessee*: in appellate business involving federal questions—conflicts about the meaning and application of the Federal Constitution, statutes enacted by Congress pursuant to the Constitution, and treaties entered into by the United States—there was a critical need for a single adjudicatory authority to avoid confusion and international embarrassment. Interpretations that varied among the American states were both destructive of federalism and subversive of the Court's role as the highest tribunal of international law within the United States.<sup>173</sup> As Story put it so clearly, in matters subsumed within the ambit of the federal questions, those cases that "enter into the national policy, affect the national rights, and may compromit the national sovereignty"<sup>174</sup> demand "uniformity of decisions throughout the United States" and enforceability through appeals to the U.S. Supreme Court.<sup>175</sup> And as Washington tacitly accepted in *Smith*, in allowing federal question appeals, the Justices of the Supreme Court necessarily must review de novo those constructions of state law upon which federal jurisdiction depended.

While it was important to assert the Supreme Court's appellate authority in federal jurisdiction appeals, it was equally important that the Court's en banc sessions not be overwhelmed with minor cases involving foreign diplomats. Congress had wisely authorized the federal circuit courts to try cases involving the private litigation of accredited ministers and their staffs. Justice Washington's circuit court docket had a number of trials on criminal indictments of Philadelphians accused of assaulting diplomats. In *United States v. Liddle*,<sup>176</sup> a constable defended himself in the course of arresting an employee of the Spanish embassy. Washington released the constable, reasoning that the accused would have to have been aware of the status of the diplomat before incurring penalties under the federal criminal statute protecting foreign ministers. In addition, it was not

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172. 11 U.S. (7 Cranch) 603, 632 (1812).

173. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 334, 335, 347–48 (1816).

174. *Id.* at 335. Compromit in a general sense is equivalent to compromise, but it is a more forceful expression of the idea that allowing such a jurisdictional matter to remain open to state determination would leave the matter of national sovereignty open to negotiation. Cf. THE OXFORD UNIVERSAL DICTIONARY ON HISTORICAL PRINCIPLES 358 (C.T. Onions ed., Clarendon Press 3d ed. 1955) (denoting "compromit" and "compromise" as synonyms).

175. *Martin*, 14 U.S. at 347–48.

176. 26 F. Cas. 936 (C.C.D. Pa. 1808) (No. 15,598).

clear whether the diplomat had struck the first blow, which would exonerate the constable under the federal statute, leaving only civil liability for assault and criminal sanctions, if any, to trial in state courts.<sup>177</sup>

Scienter also played a role in the colorful circuit court prosecution in *United States v. Hand*.<sup>178</sup> Staging a party to celebrate the czar's birthday, the Russian charge d'affairs decided to amuse Philadelphia passersby with a colored window showing an American vessel's entry into the St. Petersburg harbor. Unfortunately, the imperial crown was depicted over the flag of the United States flying at the ship's stern, and the crowd took offense. The defendant arrived at the scene intoxicated and, after the envoy's apology and explanation, fired a pistol at the window and narrowly missed the diplomat who was engaged in removing the controversial stained glass window. At trial for assault on an international embassy, the accused was acquitted by Justice Washington, who pointed out that the government had not proven that the defendant was aware that the premises he attacked with a pistol was a foreign legation.<sup>179</sup>

Washington also discharged an application for a federal habeas corpus writ sought by the Spanish legation. The secretary of the legation had been arrested for passing a forged check and was held in a Pennsylvania state prison.<sup>180</sup> Although Justice Washington conceded that the secretary was entitled to protection under international law, he pointed out that the federal statutes not only failed to confer such jurisdiction on the lower federal courts, but also did not authorize issuance of federal habeas corpus writs for the release of prisoners held under state authority.<sup>181</sup> Washington felt that under international law the lower federal courts should have been given jurisdiction in such a case, and but for his sense of judicial restraint he might well have acceded to the legation's request. Washington wrote:

I am one of those, I confess, who have always thought it would have been better, if the legislature of the Union, in allotting to the several courts the jurisdiction they were to exercise, had occupied the whole ground marked out by the constitution; but, I am not one of those, who think it a commendable quality in a judge to enlarge, by construction, the sphere of his jurisdiction that of the federal courts is of a limited nature, and cannot be extended beyond the grant.<sup>182</sup>

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177. *Id.* at 937.

178. 26 F. Cas. 103 (C.C.D. Pa. 1810) (No. 15,297).

179. *Id.* at 104–05.

180. *Ex parte Cabrera*, 4 F. Cas. 964, 965 (C.C.D. Pa. 1805) (No. 2278).

181. *Id.* at 966.

182. *Id.*

Given that state of mind, Washington doubtless felt exonerated when he was selected to deliver the Supreme Court's opinion in *United States v. Ortega*, which raised the constitutionality of Congress's decision to assign to the U.S. circuit courts the trial of criminal indictments for assaults on foreign diplomats.<sup>183</sup> *Ortega* came to the Court on certified question from Washington's Pennsylvania Circuit Court and involved yet another assault on a Spanish diplomat. The Court was asked to resolve whether the Constitution required such a case to be determined by the Supreme Court as part of its original jurisdiction. Noting that the case was a public prosecution and not a case to which a diplomat was a party, the Supreme Court held that Congress properly left trial jurisdiction with the federal circuit courts.<sup>184</sup>

#### *E. The Dilemma of The Schooner Exchange v. M'Faddon*<sup>185</sup>

The demands of international goodwill came into conflict with Washington's sense of property rights in the troubling case of *McFaden v. The Exchange*, which was tried before the Pennsylvania Circuit Court during its October 1811 term.<sup>186</sup> An unarmed American merchant ship, *The Exchange*, was captured on the high seas by a French warship and carried to a French port, where a French prize court condemned her, presumably for unneutral behavior. Thereafter, the vessel was refitted and commissioned as a public warship in the Napoleonic navy.

Driven by necessity into a Philadelphia port, the vessel, renamed *The Balaou, No. 5*, was libeled by her former owners. Apparently under the direction of the State Department, the federal District Attorney<sup>187</sup> for Pennsylvania urged that the libel claim be dismissed for lack of jurisdiction. The Pennsylvania District Court

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183. 24 U.S. (11 Wheat.) 467, 468–69 (1826).

184. *Id.* at 469.

185. The first named claimant for the vessel was one John McFaddon. *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812). However, the claimant was identified in the circuit court proceeding as "McFaden." *McFaden v. The Exchange*, 16 F. Cas. 85 (C.C.D. Pa. 1811) (No. 8786). To avoid confusion, the Supreme Court's version of the name has been used throughout this discussion.

186. 16 F. Cas. 85 (C.C.D. Pa. 1811) (No. 8786).

187. Like present day United States Attorneys, the District Attorneys appointed for each state were charged with the responsibility of conducting prosecutions and civil litigation on behalf of the United States.

declined jurisdiction, and the libellant owners appealed to Justice Washington's circuit court.<sup>188</sup>

At the outset Washington accepted the submissions of Alexander Dallas on behalf of the United States, observing that in such cases it was appropriate that the federal District Attorney appear to advise the courts of the position of the executive branch, which is constitutionally charged with the conduct of foreign relations.<sup>189</sup> From the evidence submitted by Dallas, Washington concluded that the ship was a public warship of the French navy, and that the issue was the district court's jurisdiction rather than the ownership dispute.<sup>190</sup> Observing that the writings of Cornelius van Bynkershoek had been roughly handled by counsel on one side and highly eulogized by the other, Washington noted that the author's treatise limited the sovereign's exception from court jurisdiction.<sup>191</sup> A sovereign, and thus presumably its ministers, had a personal exemption from jurisdiction, but its property was nevertheless subject to adjudications in the courts of the national territory in which the property was located. Justice Washington cited nearly a century of acquiescence to that doctrine as well as its acceptance by the eighteenth-century civilian author Thomas Rutherforth. Pressed by the arguments of counsel, he persisted in denying that the public armed vessels of a friendly foreign power should be exempt from the district court's admiralty jurisdiction.<sup>192</sup> Consequently, Washington remanded the case to the district court for trial, but not without misgivings:

I am fully sensible to the delicate nature of the question which is here decided, and I feel cheered by reflecting that the error in 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, ought not, and I hope will not, rest upon the decision of this court. I can at the same time truly declare that if I could be so wicked as to decide this case different from the opinion which I must sincerely entertain respecting it, my humble genius and talents would not enable me to give one single reason which my conscience or judgment could approve.<sup>193</sup>

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188. *McFaden*, 16 F. Cas. at 86. For an extended discussion of the importance of this case and attention to the preliminaries, see HASKINS & JOHNSON, *supra* note 23, at 531–34.

189. *McFaden*, 16 F. Cas. at 86.

190. *Id.* at 86–88.

191. *Id.* at 87–88.

192. *Id.*

193. *Id.* at 88.

After such an invitation to appeal, what litigant or attorney could resist? Appeal they did, and reversed he was.<sup>194</sup>

In reversing Washington, Chief Justice Marshall's opinion began with a broad statement of the degree to which international law required forbearance and evenhandedness in the conduct of relations between sovereign nations. He pointed out that the arrival of a naval warship in the ports of a friendly nation normally raises no concern or threat to peace, provided that the territorial sovereign has no prohibition against such an entry.<sup>195</sup> To the Court it appeared that there was "a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."<sup>196</sup> Until the territorial sovereign unequivocally demonstrates that such use of its territory is unacceptable, the judicial authorities of the visited nation cannot appropriately subject a friendly visiting warship to their jurisdiction to determine rights claimed by a private party. *The Exchange*, now a French public vessel of war, had come to the United States under an implied promise that while she carried herself in a friendly manner she could not be subjected to the jurisdiction of the United States or its courts.<sup>197</sup> Therefore, the district court was correct to dismiss the libel action, and Justice Washington's decision was reversed.<sup>198</sup>

To a degree, Washington's jaundiced view of the irregular proceedings of French prize courts<sup>199</sup> may well have clouded his judgment, but the case did represent a difficult problem of balancing an American citizen's property rights against broader issues of international law and practice that, if breached by the federal courts, might well embarrass the political branches of government and trigger tensions in diplomatic affairs. Those public law considerations weighed heavily upon Washington's colleagues, including John Marshall. Indeed, from Washington's comments at the end of his circuit court opinion (quoted in part above), it seems obvious that he was also highly persuaded by public law considerations despite his ultimate decision favoring property rights.

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194. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *see also* HASKINS & JOHNSON, *supra* note 23, at 531-43 (placing the Supreme Court decision within the broader consideration of the validity of French prize court decrees).

195. *The Schooner Exchange*, 11 U.S. at 136-39, 141.

196. *Id.* at 145-46.

197. *Id.* at 146-47.

198. *Id.* at 147.

199. *See supra* text accompanying note 194.

*F. Statutory Construction*

Another contrast between Washington and the Chief Justice emerges in their differing approaches to statutory construction. In terms of economic reasoning, the case of *United States v. Fisher*<sup>200</sup> is particularly revealing. *Fisher* involved the question of a federal government priority in the assets of a bankrupt debtor and the degree to which such a priority would create a secret lien that in commercial practice would severely undermine the confidence of would-be investors.<sup>201</sup> After a careful analysis of the two statutes involved, Washington, in the Pennsylvania Circuit Court, concluded that a federal government priority was limited to cases in which the bankrupt debtor's assets were involved in transactions with public officers or other officials involved in the collection of public accounts.<sup>202</sup> A 1797 federal statute granting a priority in its first three sections appeared to limit its operation to those officers who, as Washington noted, were either well-known or identifiable and whose business with the bankrupt debtor would have served as a warning that some governmental interest might give priority to assets in the event of an insolvency or bankruptcy.<sup>203</sup> The fifth and sixth sections of the same statute purportedly gave a government priority when "any revenue officer or other person thereafter . . . [became] indebted to the United States by bond or otherwise became insolvent." This gave rise to the liberal interpretation that under all circumstances any individual's estate might be impacted by a federal government priority.<sup>204</sup> As Washington's jury charge below indicated, Section 62 of the 1800 bankruptcy statute expressly preserved all previous statutory priorities granted to the federal government: "[N]othing contained in this law shall in any manner affect the right of preference to prior satisfaction of debts due to the United States, as secured or provided by any law heretofore passed . . ."<sup>205</sup> The case thus raised the issue of the construction of the terms "or other person" in the 1797 Act.

Justice Washington at the outset of his jury charge in the circuit court began by concluding that the scope of the U.S. priority was not clear, given the divergence of sections five and six from the first four sections, which simply mentioned "revenue officers" and

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200. 6 U.S. (2 Cranch) 358 (1805).

201. *Id.* at 385.

202. *United States v. Fisher*, 25 F. Cas. 1087, 1089 (C.C.D. Pa. 1803) (No. 15,103).

203. *Id.* at 1088.

204. *Id.*

205. *Id.* at 1087.

"persons accountable for public money."<sup>206</sup> He found that "the evident intention is different from the import of the literal expressions used in some part of the law, [and legislative] intention should prevail."<sup>207</sup> In seeking to divine Congress's intent, he considered the consequences if the concluding sections of the statute were held to control the applicability of the sections that did not contain the "or other persons" phrase—namely that secret, or inchoate, liens would weaken the confidence of businessmen in their extending credit to others.<sup>208</sup> Not mentioned in Washington's opinion is the possibility that such a secret lien would also impair the negotiability of bills of exchange in interstate and foreign commerce.<sup>209</sup>

On appeal by writ of error to the Supreme Court, Washington's view of the law was reversed by an opinion delivered by Chief Justice Marshall. He began by asserting that the intent of the 1797 statute was plain, and thus judicial construction was precluded.<sup>210</sup> The first four sections and the two following established priorities in favor of the federal government, but the first four did so in regard to specified officials, while the latter two included within their scope a more expanded catalog of obligations to the government that should be granted priority against general creditors in insolvency or bankruptcy proceedings.<sup>211</sup> Had ambiguity been present, the arguments on behalf of the creditors would have been appropriate, particularly if the rights they claimed were fundamental. However, resort to judicial construction of "only a political regulation" based on the claim that the statute's result is commercially "inconvenient" would substitute the

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206. *Id.* at 1088.

207. *Id.*

208. *Id.* at 1088–89. Since the priority was claimed on the basis that the bankrupt had endorsed a bill of exchange to the Bank of the United States and that it was subsequently protested, only a broad construction of the 1797 statute would bring the bankrupt within its terms as an "other person." On the difficulties inherent in inchoate liens, see generally HASKINS & JOHNSON, *supra* note 23, at 401–05, 575–87.

209. The Marshall Court subsequently had to deal with what might be termed "secret forfeitures" under the Embargo Acts, upholding these enforcement measures and disregarding a claim under a bottomry bond. In admiralty law, bottomry bonds were used to secure loans made while a ship was away from its home port; they facilitated the extension of credit when emergency repairs were required. Since forfeitures under the Embargo Acts attached when a ship departed in violation of its Embargo bond, but were not enforced until its return, the lien of a bottomry bond was junior to that under the Embargo statutes. Potential lenders might well be dissuaded by the possible existence of such a "secret lien" under the Embargo laws. HASKINS & JOHNSON, *supra* note 23, at 427–28, 492. However, in *Fisher*, Robert G. Harper had argued eloquently against such "peculiar and secret liens, indiscreetly multiplied," specifically noting the threats they posed to credit and the conduct of commerce. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 371 (1805).

210. *Fisher*, 6 U.S. at 386.

211. *Id.* at 388–89.

judge's views for those of the legislature.<sup>212</sup> Such a "constrained interpretation" assumed that the legislature had not already considered that matter and had not balanced the "inconvenience" against the benefit of a broad priority to the federal government.<sup>213</sup> In a rare departure from his usual practice of silent acquiescence, Bushrod Washington appended an explanation of his reasoning, which is included below. While he took no part in Supreme Court appeal, he nevertheless felt that the importance of the issue justified and required an explanation.<sup>214</sup> For the most part, his explanation followed the reasoning of his circuit court charge, but there is heat in his additional material: "So if the literal expressions of the law would lead to absurd, unjust or inconvenient consequences, such a construction ought to be given as to avoid such consequences, if, from the whole purview of the law, and giving effect to the words used, it may fairly be done."<sup>215</sup>

Despite his firm stand in the *Fisher* case,<sup>216</sup> Washington tended to follow the plain meaning of statutes, as is demonstrated by his holding in the case of Pierce Butler and his slave Ben, decided in Pennsylvania's Circuit Court in 1806<sup>217</sup> and resulting in the slave's emancipation. The critical issue was whether Butler, a perennial but peripatetic congressman from South Carolina, had become a resident of Pennsylvania.<sup>218</sup> There were two exceptions to the 1780 Pennsylvania statute emancipating slaves then or thereafter living within the state. Members of Congress who brought slaves with them to Philadelphia were excepted from statute, as were sojourners who were simply passing through Pennsylvania accompanied by one or more slaves.<sup>219</sup> On circuit, Justice Washington found that because Butler resided in Philadelphia with Ben for a two-year period when Butler was not a member of Congress, the congressional exception was

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212. *Id.* at 390.

213. *Id.*

214. *Id.* at 397–405. On Washington's usual practice, see JOHNSON, *supra* note 16, at 122 ("Judge Washington, although rarely delivering opinions of the Court in the fields represented, delivered the Supreme Court's majority opinion affirming two of his own circuit court cases.").

215. *Fisher*, 6 U.S. at 400. It is significant that Justice Story, who also had a large commercial case docket in his New England circuit courts, also differed with Marshall over the issue of secret, or inchoate, liens. See HASKINS & JOHNSON, *supra* note 23, at 586 (discussing the parallel between Washington's dissent in *United States v. Fisher* and Story's dissent in *United States v. 1960 Bags of Coffee*).

216. See *supra* text accompanying notes 214–15.

217. *Butler v. Hopper*, 4 F. Cas. 904 (C.C.D. Pa. 1806) (No. 2241).

218. *Id.* at 905.

219. *Id.*

inapplicable in Butler's situation.<sup>220</sup> Nor was Butler a sojourner under the statute by virtue of owning a summer house in Philadelphia, for Butler also owned residences and plantations in South Carolina and Georgia.<sup>221</sup> Although Justice Washington gave counsel wide latitude in offering evidence tending to prove Butler's failure to alter his domicile of origin—South Carolina—he nevertheless insisted that the plain meaning of the Pennsylvania statute's exceptions required him to rule in favor of Ben's emancipation.<sup>222</sup>

A similarly close reading of the federal Fugitive Slave Act of 1793 led Justice Washington to reject an application for extradition submitted to him while presiding in the Pennsylvania Circuit Court.<sup>223</sup> Here, because the slave voluntarily accompanied his master to Pennsylvania and remained there for an extended period of time, Washington held that he had become subject to the state emancipation statute and was not subject to the federal Fugitive Slave Act because he was not a fugitive from slavery when he entered Pennsylvania.<sup>224</sup>

Washington's willingness to consider legislative intent to secure substantial justice is illustrated in *Tryphenia v. Harrison*,<sup>225</sup> a case in which two French women traveled through Philadelphia, where they boarded a vessel for Havana. Two slaves accompanied them, and when the ship returned to Philadelphia, it was sentenced by the district court and condemned to be sold for violating federal statutes prohibiting the use of American ships in the international slave trade. On appeal, Washington reversed the sentence, reasoning that Congress intended to prevent American citizens from engaging in the international slave trade. Because the slaves were not transported to Cuba for purposes of sale, the statute was not violated.<sup>226</sup>

### III. CIRCUIT COURT DUTIES

Prior to the elimination of Supreme Court circuit riding in 1892, most of a Supreme Court Justice's time was occupied by trying cases and hearing appeals in his assigned circuit courts. As noted earlier,<sup>227</sup> there were several occasions in which work in the circuits

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220. *Id.*

221. *Id.*

222. *Id.*

223. *Ex parte Simmons*, 22 F. Cas. 151 (C.C.E.D. Pa. 1823) (No. 12,863).

224. *Id.* at 151–52.

225. 24 F. Cas. 252 (C.C.D. Pa. 1806) (No. 14,209).

226. *Id.* at 253.

227. See *supra* text accompanying notes 48–49. .

related to the cases heard en banc during the Court's yearly session. Perhaps the best illustration of that connection is *Corfield v. Coryell*,<sup>228</sup> a case in which decision was reserved in Justice Washington's Pennsylvania Circuit Court at the same time that *Gibbons v. Ogden* was argued and decided in the Supreme Court.<sup>229</sup> From Justice William Johnson's dissent, we know that the *Gibbons* Court spent some time debating whether the Commerce Clause conferred exclusive powers upon the federal Congress. Chief Justice Marshall's opinion for the Court recognized the extensive scope of congressional regulatory power over interstate commerce, yet it stopped short of declaring federal authority to be exclusive of any state legislation in the area.<sup>230</sup> Is it possible that *Corfield*, dealing with property rights in the state of New Jersey, was in the mind of Justice Washington or even, through him, in the minds of his colleagues like John Marshall?

*Corfield* involved the arrest of Pennsylvania oystermen and their vessel upon the charge that they were taking oysters from beds off of Cape May in New Jersey.<sup>231</sup> In accordance with a state statute, the boat was sold at auction for the benefit of the State of New Jersey, and the oystermen subsequently sued the state officials in the Pennsylvania Circuit Court for trespass based on the seizure of their boat and its equipment. In response to the fact that they were farming New Jersey oyster beds, they claimed that the Commerce Clause rendered unconstitutional New Jersey's restriction that its oyster beds could be farmed only by residents of New Jersey.<sup>232</sup> The case thus brought before the circuit court the question of the degree to which the Commerce Clause clashes with the traditional authority of a state to control its natural resources, which was as much a matter of public property rights as it was an aspect of state police powers. In exonerating the New Jersey law enforcement officers in a judgment given subsequent to the *Gibbons* opinion, Justice Washington observed:

[T]he power which congress possesses to regulate commerce does not interfere with that of a state to regulate its internal trade, . . . much less can that power impair the right of

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228. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

229. 22 U.S (9 Wheat.) 1 (1824).

230. Compare *id.* at 227–29 (Johnson, J., concurring) (arguing for the exclusivity of Congress's power to regulate commerce), with *id.* at 197–98, 203–06, 222 (Marshall, C.J.) (arguing that the States also have power to regulate commerce within their respective jurisdictions).

231. *Corfield*, 6 F. Cas. at 548.

232. *Id.* at 550.

the state government to legislate, in such manner as in their wisdom may seem best, over the public property of the state . . . .<sup>233</sup>

Referring to the Privileges and Immunities Clause as it was understood in the Articles of Confederation and in the Federal Constitution, he acknowledged that the rights conferred upon nonresidents of a state were extensive, but he insisted that this did not require a state to extend particular benefits to nonresidents, such as access to oyster beds, which are owned in common by all the citizens of the state and cannot be enjoyed by others without express statutory permission.<sup>234</sup> In addition, the power to regulate oyster beds was vested in the State of New Jersey at the time the Federal Constitution was ratified, and neither the Constitution nor any subsequent federal legislation dealt with fisheries or oyster farming.<sup>235</sup> Therefore, the power to regulate remained with New Jersey.<sup>236</sup>

Although Washington's brothers on the Supreme Court did not have the benefit of his *Corfield* opinion when they considered *Gibbons*, the very pendency of the case alerted them to the ramifications of holding the Commerce Clause to be exclusive. Despite the substantial alterations in federalism inherent in adopting the Constitution, the states continued to exercise extensive powers derived as much from their colonial backgrounds as from traditional understandings of sovereignty. Those residual state powers might, as in *Corfield*, have involved situations in which the state governments exercised certain proprietary and management rights over natural resources that were the common property of their inhabitants.<sup>237</sup>

Few of Washington's other circuit court cases have had the impact of *Corfield*, but the size and diversity of the dockets provided him with a continuing opportunity to shape federal and international law. Throughout his service—from the Quasi War with France to the wars of revolution in South America—prize and marine insurance cases were a steady component of his trial and appellate caseload. Complicated issues of Pennsylvania and New Jersey land law passed through his courts on their way to the Supreme Court. Admiralty cases involved claims for seamen's wages, and the criminal business in admiralty included a number of mutiny trials. It is in this multitude of cases that Washington and his fellow Justices made their greatest

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233. *Id.* at 550–51.

234. *Id.* at 552.

235. *Id.* at 553.

236. *Id.*

237. See generally HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 177–204 (1983) (discussing the legal implications of local governments' ownership of private property).

contribution to the advancement of federal justice in the young republic. Buried in the Federal Cases thirty-volume set, there is ample proof of the true greatness of a man known today primarily as John Marshall's "twin."

#### IV. CONCLUSION

While Bushrod Washington was closely identified with Chief Justice John Marshall, the two men nevertheless differed on significant matters of law. In part, this difference was due to their varied experiences in the circuit courts, but it also reflected varying views of law and its relationship to society. Comparing the two, it appears that Washington adapted more readily to changing conditions, while Marshall's conservatism hardened to the point that he ultimately found it difficult to synthesize the views of his colleagues into unitary "opinions of the Court." Increasingly, that task fell to Washington and Justice Joseph Story. In addition, the issuance of two opinions in *Green v. Biddle*<sup>238</sup> would suggest that as Chief Justice, John Marshall in 1823 may have had periods of diminished sensitivity to public opinion and the need to avoid unnecessary conflict with the states and the other branches of the federal government. The skill and diplomacy of Justice Washington may well have protected the aging Chief Justice from many similar lapses.

Even this brief comparison of Justice Washington and Chief Justice Marshall suggests that it is simplistic to analyze the Supreme Court by way of political labels. So-called "Federalist" judges were not inevitably pitted against their incoming "Republican" or "Jacksonian" colleagues. Indeed, changes in Court decisions were probably as much due to changing positions of individual Justices as they were due to new appointments to the bench. One must exercise caution when judging the relative effectiveness of a Supreme Court Justice. Men who share Washington's temperament and commitment to the collegial reputation of the Supreme Court tend to be dwarfed by their more volatile or loquacious associates. In judicial history it is the squeaky wheels who gain scholarly attention and are oiled with the fame of academic concern. Supreme Court history ought to spend more time with judicial biography, giving close attention to the varied roles that each of the Justices played, both in the circuit courts and on the bench of the high Court.

This brief and necessarily selective consideration of the contributions of Justice Bushrod Washington suggests that although

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238. 21 U.S. (8 Wheat.) 1 (1823).

his preference for discouraging dissent in the Supreme Court has obscured his role, he did much to enhance the work and reputation of the Marshall Court. For most of his later years in judicial service, Washington undertook the task of delivering, and probably preparing, a number of the Supreme Court's opinions. In certain situations his calm demeanor and skills as a negotiator and mediator proved invaluable. Although he frequently agreed with or acquiesced in the opinions of his close friend John Marshall, there were occasions when the two Justices differed both strongly and publicly. Through Washington's own extrajudicial efforts in recording and editing case reports from his circuit courts, his contributions as a trial judge have been well-preserved and deserve closer attention from the constitutional history community.

More broadly, examining Washington's work provides a new and revealing window on the last two decades of the Marshall Court. As age began to make inroads on the Chief Justice's health, Washington, along with Justice Story, assumed more significant responsibilities in opinion writing and delivery. In addition, disagreements over the legal foundations of economic development consumed a growing part of the Court's discussion in conference. An increasing number of Washington's differences from Marshall's centered around three themes: (1) the tension between natural rights to contract and the authority of government to regulate individual initiative in contractual matters; (2) the degree to which secret forfeitures and hidden liens should be permitted to burden commercial activity and create instability and suspicion in credit arrangements; and (3) the extent to which a Justice should defer to legislative intent in the construction of statutes. Future study would profit from a consideration of the degree to which the Justices' individual experiences in the circuit courts shaped their personal perspectives as well as their approach to constitutional jurisprudence. Finally, historical study of the U.S. Supreme Court demands that scholars take a more comprehensive approach to the Court as a whole and understand each Justices as both an individual and also as a productive contributor to the ongoing life and evolution of the high Court.