Justice Bushrod Washington and the Age of Discovery in American Law

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I. INTRODUCTION

Bushrod Washington was appointed to the United States Supreme Court by President John Adams in 1798.¹ Nephew of George Washington, committed to the principles of the Federalist Party, and only thirty-six years old, he was the youngest Justice ever appointed to the Court at that time.² Washington would serve on the Court until his death in 1829, a period of nearly thirty-one years.

The period of Washington's service on the Supreme Court was marked by

¹ United States District Judge for the Southern District of West Virginia. B.A. West Virginia University, 1964; J.D. Yale University, 1967; LL.M. University of Virginia, 1998.

This Article, in a slightly different form, was submitted to the faculty of the University of Virginia as a thesis in partial fulfillment of the requirements for the degree of Master of Laws in the Judicial Process, Graduate Program for Judges, University of Virginia School of Law, April 9, 1998. Professor G. Edward White, my thesis advisor, patiently read several drafts and made numerous helpful suggestions – he bears no responsibility for any errors which remain. Kent C. Olson, Assistant Librarian for Public Services at the University of Virginia Law Library, was especially helpful in identifying and obtaining source materials. My secretary for many years, Linda F. Kinder, typed and proofread the manuscript and was an invaluable contact with several libraries in the federal system. Judge Irene M. Keeley of the United States District Court for the Northern District of West Virginia encouraged me to offer this Article for publication; more importantly, she encouraged the West Virginia Law Review to accept it. My colleagues on the United States District Court for the Southern District of West Virginia, especially Chief Judge Charles H. Haden II and Senior District Judge Elizabeth Hallanan, made it possible for me to attend the Graduate Program for Judges at the University of Virginia where this Article was generated.

dramatic social, cultural, and economic change. A new nation was constructed upon the ruins of the British monarchy in America; a new nation which required a new legal system. Professor Gilmore, in The Ages of American Law, offered his view of how courts and the legal profession responded to this challenge. He perceived this era as the “Age of Discovery” in American law, an “explosion of creative energy.”3 American courts, Gilmore maintained, set out in quest of a distinctly American law4 — a law which had to be accommodated to the spirit of the frontier5 and the process of industrialization.6 Similarly, Professor Horwitz, in The Transformation of American Law, discerned a sea change in the very function of law in America between 1780 and 1820. It moved, he said, from a device to decide individual cases to an instrument of social change.7

For both Gilmore and Horwitz, Joseph Story is the prototypical judge of the age, routinely assuming jurisdiction over issues thought in other countries “to lie well beyond the limits of judicial competence,”8 and writing “classically transitional” judicial opinions “filled with ambiguities sufficient to make any future legal developments possible.”9 A Harvard law professor, Story was “deeply learned in many legal subjects . . . and a prolific author of commentaries.”10 His opinions tend to be long discourses on the law, liberally adorned with obiter dicta. They contrast with the work of Chief Justice Marshall, whose constitutional opinions often disdain citation of authority and rely heavily on internal reasoning. Marshall attained greatness through his opinions and produced timeless results, but his opinions often lack the mark of scholarship. One writer described them as “powerful, but unscholarly, olympian, but redundant.”11

In life, Bushrod Washington was the personal friend, judicial ally, and intellectual companion of both Story and Marshall. In death, his memory is overshadowed by theirs. Washington’s reputation, secure in his own day, has suffered with the passage of time. Senator Albert J. Beveridge, in his great biography of Marshall, referred to Washington as “the slow-thinking Bushrod Washington.”12 This characterization, however inaccurate, has become the modern conception of Washington. The nadir was reached in 1970 when Isidore Silver, writing for Commonweal magazine, described Washington’s achievements as

4 See id. at 21.
5 See id.
6 See id. at 24.
8 GILMORE, supra note 3, at 35.
9 HORWITZ, supra note 7, at 39.
"utterly insignificant." The volumes in the History of the United States Supreme Court by Professors Haskins and Johnson and White have done much to correct the record, but Washington remains under-appreciated, crowded from the stage by his better-known colleagues. This Article attempts a reassessment of Justice Washington's judicial impact and historical significance, and asks whether he fits the mold of the typical judge of the Age of Discovery as described by Gilmore and Horwitz. It begins with a description of the historical context in which Washington lived and worked, considers his legal training and career as a lawyer, and proceeds to an analysis of selected opinions.

Bushrod Washington wrote eighty-one separate opinions in Supreme Court cases. In addition, as was the practice for justices in his day, he "rode circuit;" that is, he sat as a trial and appellate judge in the circuit courts of the United States. Almost six-hundred of Washington's circuit court opinions have been published. Because of the volume of Washington's published works, a comprehensive assessment of all his opinions is beyond the scope of this Article. The cases discussed herein are limited to four areas which represent Washington's judicial principles in the context of the important legal issues of his age. The goal of this Article is to situate Justice Washington's career in the historical framework in which he worked; the Article addresses cases which had particular significance for that time period or which are especially revealing with regard to Justice Washington's judicial philosophy and temperament. The four areas are constitutional cases, maritime law (particularly marine insurance and prize cases), western lands, and a miscellaneous category involving slavery and criminal law.

The assessment of any judge or justice's work and thought must begin with his or her view of the Constitution and the proper judicial role in constitutional cases. Washington did not write often for the Supreme Court in constitutional cases, but his opinions which do exist, including circuit opinions which touch on constitutional issues, are revealing. The next two categories of cases represent two directions in which the energy of the young republic exploded. America's sea-going commercial interests drew her unavoidably into the struggle between England and France at a time when the courts were called upon to develop an American commercial and maritime law. Coincident with the growth of maritime

13 Isodire Silver, The United States Supreme Court from Bushrod Washington to Roman Hruska, COMMONWEAL XCII at 224 (1970), quoted in ANNIS, supra note 2, at 1.
17 The Supreme Court opinions are found in volumes 3 U.S. (3 Dall.) through 27 U.S. (2 Pet.) of the SUPREME COURT REPORTS. Between 1826 and 1829, Richard Peters, Jr. edited and published most of Washington's circuit opinions in four volumes. See B. WASHINGTON, REPORTS OF CASES DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE THIRD CIRCUIT, (Peters ed., 1826-1829). The circuit opinions are also published in FEDERAL CASES, volumes 2 through 30. Citations of circuit opinions in this Article are to FEDERAL CASES.
interests, the westward migration produced a conflict between rules governing title to real property and national commercial interests. Finally, selected cases involving the slavery question and aspects of criminal law are particularly disclosive of Justice Washington’s humanity and personal philosophy. Together, these four categories of cases give us a relatively clear picture of Justice Washington’s judicial philosophy and character and his historical significance and impact.

II. THE AGE OF DISCOVERY: 1781-1830

The Age of Discovery began with the American victory at Yorktown, one of history’s great turning points; fittingly, Justice Washington was there. A brief window of French naval superiority and the mistakes of his superior officer had placed Lord Cornwallis, commanding British forces in the southern colonies, in a trap between the James and York Rivers. Here, over a period of weeks, French and American artillery and relentless attacks on his lines had decimated Cornwallis’s forces, their supplies, and their will to fight. On October 19, 1781, Cornwallis surrendered.

Present in the Allied ranks that afternoon to witness the surrender was the nephew of the American commander George Washington. Bushrod Washington was a private soldier in Colonel John Mercer’s Virginia dragoons. Small of stature, with light brown hair and delicate features, he resembled his famous uncle not at all. But, like his uncle, he had proven his courage. Cornwallis had invaded Virginia the previous May and Bushrod Washington, recently a student at the College of William and Mary, had answered the call for volunteers. Young Washington made the transition from student to soldier successfully. In his memoirs, Light Horse Harry Lee recounts with approval the operations of Colonel Mercer’s corps in the weeks before Yorktown. When shadowing Cornwallis’s movements at the James River, near Greenspring in early July, Bushrod Washington was one of “two intelligent young dragoons . . . who had been sent to the river with glasses, to attend to the passage of the enemy across it.” Mercer’s cavalry bore the brunt of Cornwallis’s counterattacks in the ensuing battle of Greenspring. On October 3, Mercer’s corps was again in the thick of the action against Lt. Col. Tarleton’s legion near Yorktown. In a fierce fight, Mercer’s troops halted Tarleton’s advance, then forced his retirement while nearly exhausting their

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19 See ANNIS, supra note 2, at 31.
20 See HORACE BINNEY, BUSHROD WASHINGTON 6 (1858).
21 See ANNIS, supra note 2, at 31.
23 See id. at 433.
24 See id. at 435.
own ammunition.25

Although the war would go on for some months more, primarily as a naval struggle between France and Britain in the West Indies, Yorktown ultimately produced the fall of Lord North’s government and the independence of the American colonies.26 Shortly after Yorktown, Mercer’s corps disbanded and Bushrod went home intending to continue his study of law.27 He was destined for a successful career as a lawyer and to become the lord of Mount Vernon and a Justice of the United States Supreme Court. Appointed to the Court by President Adams in 1798, he would serve until his death in 1829, the year Andrew Jackson took office as President. On the afternoon of Cornwallis’s surrender, young Washington could not possibly have foreseen the changes he would witness during his lifetime. At Yorktown he stood on the threshold of a new age.

This new age, the period from the end of the American Revolution until the first administration of President Andrew Jackson, was a remarkable era presenting numerous challenges to the legal profession. A few facts illustrate the magnitude of change and the significance of the challenge.

The Treaty of Paris officially ended the Revolutionary War in 1783 and added over 541,000,000 acres of western land to the thin band of territory along the Atlantic seaboard controlled by the original thirteen colonies.28 Twenty years later the Louisiana Purchase added 828,000 square miles, effectively doubling the land area of the United States.29 When the Spanish cession of Florida was completed in 1819, the country had gained 46,000,000 acres more.30 The new nation therefore had plenty of room in which to grow. Cheap western land beckoned to the ambitious and the venturesome.

The remarkable territorial expansion of the United States was accompanied by an astonishing growth in population. Official census figures from 1790 to 1830 reveal increases from decade to decade of well over thirty percent each.31 A national population of 3,929,000 in 1790 grew to 12,866,000 in 1830.32 Population growth proved a fitting complement to the ready availability of inexpensive western land. Accompanying the overall growth in population, therefore, was a shift in population from the Eastern states to the territory west of the Appalachian Mountains. Cheap western lands gave the growing populace a place to go and a

25 See id. at 498.
26 See MIDDLEKAUFF, supra note 18, at 570. Lord Frederick North became head of the British government in January 1770. He was forced to resign in March 1782, after military reverses at Yorktown and in the West Indies. His successor, Lord Rockingham, immediately opened peace negotiations with the Americans. See id. at 208, 571.
27 See ANNIS, supra note 2, at 33.
29 See id. at 150.
30 See id. at 572.
31 See id. at 632.
32 See id.
way to prosper. Many veterans of the Revolutionary War were paid for their service with tracts of land in the West. Countless others saw in western land prospects for a new start and a better life.

In 1790, only one million people lived beyond the mountains. This grew to 2,217,474 in 1820 and to nearly 3,700,000 in 1830. Between 1812 and 1821 six new states were admitted to the Union and all experienced phenomenal population growth. Illinois, for example, grew by 185% between the enumerations of 1820 and 1830. The growth of population and its flow westward brought with it all the accoutrements of growth — the demand for goods and services as well as the means to deliver them, finance them, and pay for them.

As the new nation moved West, it also expanded in other directions over the oceans. At its inception, the United States was a maritime nation, wedded to the sea and foreign commerce. Because of the great natural barrier consisting of the Appalachian Mountains and its virtually impassible forests and streams, the West Indies and the harbors of Europe seemed closer to the original colonies than the western lands. Independence gave a renewed impetus to seaborne commerce. From 1790 to 1801 exports rose rapidly from twenty million to ninety-four million a year. During the same period imports increased from twenty-three million to $110 million. The impact of the Napoleonic Wars and America’s response caused several periods of contraction between 1800 and 1815, but the general trend in foreign commerce was upward. Exports peaked at $138.5 million in 1807, and remained steady at about seventy million a year from 1815 to 1830. The United States ran foreign trade deficits throughout this period.

Henry Adams described the isolation of the western territories in 1800 which continued in spite of the post-Revolution flood of immigrants. “Nowhere did eastern settlements touch the western,” and “[a]t least one hundred miles of mountainous country held the two regions everywhere apart.” In the West, the natural flow of trade was away from the eastern seaboard, down the Mississippi to the Gulf of Mexico. This physical separation placed obvious strains on the

34 See id.
35 See id.
36 See id.
37 See ENCYCLOPEDIA OF AMERICAN HISTORY, supra note 28, at 689.
38 See id.
39 See id.
40 See id. at 690.
41 See id.
43 See id.
relationship of the two regions and it was, for a time, doubtful whether the West could be held in the Union.

A great revolution in transportation ended the isolation of the two regions and, coupled with a renaissance in innovation and technology, produced unprecedented commercial activity and economic growth. As population and internal trade increased, the demand for transportation facilities grew. The first phase of the transportation revolution was "a remarkable period in improved road building." The Philadelphia and Lancaster Turnpike set the standard. Designed to connect the headwaters of the Potomac and Ohio Rivers, its sixty-two-mile course was completed in 1794 at a cost of $465,000. A huge financial success, its shareholders were paid annual dividends as high as fifteen percent from tolls collected. Success of the Philadelphia-Lancaster Pike led to a furious period of road construction. The crown jewel of the age of turnpikes was the Cumberland Pike or Old National Road, a paved thoroughfare connecting Cumberland, Maryland, with the Ohio River at Wheeling. Eventually extending through the Midwest to Illinois, the National Road provided a connection of east to west and stimulated commerce and interest in internal improvements of all kinds. By 1821, 4,000 miles of new turnpikes had been completed.

Construction of turnpikes led to a rapid increase in postal service. Federal legislation in 1794 and 1814 produced expansion of mail service. In 1794 there were only 5001 miles of post roads in operation; by 1829 this had increased to 104,521.52 Paralleling construction of the turnpikes was the construction of canals. Miles of man-made watercourses connected the natural commercial waterways of east and west. The financial success of the Erie Canal, connecting Lake Erie to the Hudson River, set off a boom in canal construction. The original Erie Canal was 363 miles long and cost over $7,000,000 to build.54 It paid for itself within nine years, however, from tolls collected.55

44 CARMAN & SYRETT, supra note 33, at 486.
45 See id.
46 See id.
47 See ENCYCLOPEDIA OF AMERICAN HISTORY, supra note 28, at 572.
48 See id. at 420.
49 See CARMAN & SYRETT, supra note 33, at 467.
50 See ENCYCLOPEDIA OF AMERICAN HISTORY, supra note 28, at 421.
51 See id. at 419.
52 See id.
53 See WHITE, supra note 15, at 16.
55 See CARMAN & SYRETT, supra note 33, at 475.
3,000 miles of canals had been built at a cost of $125 million.56 Success of the canals and turnpikes greatly reduced land transportation costs and made trans-Appalachian trade feasible. The regions were drawn together by the resulting boom in commerce and its augmentation of the nation’s wealth.57 Stimulated by the transportation revolution and the commercial activity that went with it, an era of business and manufacturing innovation ensued. Arkwright machinery and the textile industry led the way.58 When the Napoleonic Wars interrupted the flow of manufactured goods from Europe, Americans responded by building their own mills.59 New England saw the beginning of mass production and Pittsburgh the inception of the mechanized iron industry.60

Originally powered by falling water, American industry gradually turned to steam. Steam-powered travel was but a short further step. Steam-driven boats were successfully launched in 1787 by John Fitch in New Jersey and James Rumsey on the Potomac at Shepherdstown,61 but it was Robert Fulton, two decades later, who built the first commercially practicable steamboat.62 Growth of steam transportation on the Great Lakes and inland waterways was swift and substantial. In 1817, there were seventeen steamboats operating on western rivers; three years later there were sixty-nine.63

Commercial and industrial activity demanded the financial machinery to facilitate itself. From 1801 to 1811 the number of state banks rose from thirty to eighty-eight.64 The device of limited liability for business enterprise also grew. Beginning with New York in 1811, states substituted general corporation laws for the previous practice of seeking charters from the state legislature.65 There was no national currency. Private bank notes were the principal medium of exchange,66 and human ingenuity developed many methods of paying obligations and transferring wealth. In the West, for example, land warrants circulated as a type of commercial paper.

Growth and change challenged the law and the legal system. Developing a legal system for the new nation was a monumental task, made more difficult by the pace and magnitude of change. Justice Washington joined the Supreme Court just as this process was gaining momentum. He was to play a key role as the Court

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56 See Burns, supra note 54, at 304-05.
57 See Carman & Syrett, supra note 33, at 475.
59 See Burns, supra note 54, at 291.
61 See id. at 784-85.
62 Id. at 785.
63 See Burns, supra note 54, at 300.
65 See id.
confronted the issues of dynamic growth and the development of a commercial economy.

III. A JUSTICE'S PREPARATION: 1762-1798

For early clues to Justice Washington's judicial philosophy, we look to his education. Born in Westmoreland County, Virginia, on June 5, 1762, Bushrod Washington was the eldest son of John Augustine Washington, next eldest brother of George Washington. At an early age his father placed him with a private tutor in the home of Richard Henry Lee. Lee's influence on him must have been slight, however, for Lee was destined to become a leader of the anti-federalist party in Virginia, in sharp contrast to Bushrod's consistent federalist sympathies. Later, Bushrod was privately tutored at home. Because a classical education was necessary for admission to William and Mary, his instruction probably included Greek and Latin.

In 1778, shortly before his sixteenth birthday, Bushrod Washington graduated from the College of William and Mary. The following year one of the early milestones in American legal education was passed — George Wythe was appointed to the first chair of law in an American college. Wythe's appointment drew many scholars to William and Mary, among them Bushrod Washington, who returned to the school in 1780. Wythe had been a signer of the Declaration of Independence and a chancery judge in Virginia. Moreover, he was "perhaps the foremost classical scholar in the state." Later, as a federalist delegate to the Virginia Ratification Convention, Wythe played a key role in securing approval of the Constitution. Wythe used English law texts and constructed a curriculum which included regular lectures on various subjects of law and a series of moot

67 See Bushrod C. Washington, The Late Mr. Justice Bushrod Washington, IX No. 8 THE GREEN BAG 329 (1897).
68 See Obituary, 28 U.S. (3 Peters) vii (1804).
71 See Obituary, 28 U.S. (3 Peters) vii (1804).
72 See ANNIS, supra note 2, at 21.
73 See id. at 26.
74 See FRIEDMAN, supra note 66, at 120.
75 See ANNIS, supra note 2, at 26.
76 See id.
77 FRIEDMAN, supra note 66, at 120.
78 See GOEBEL, supra note 70, at 390.
courts. The "most respectable citizens" were recruited as audiences for the moot court proceedings over which Wythe and other professors sat as judges. There was also a mock legislature, with Wythe presiding as Speaker, in which the law students drafted bills, debated, and went through all the procedures of a legislature. Washington studied under Wythe at William and Mary for at least three months. While studying under Wythe, Washington formed a friendship with John Marshall, a fellow student several years his senior, that would last a lifetime. In May of 1780, Marshall and Washington were both initiated into the Society of Phi Beta Kappa at William and Mary. It is not clear when Washington left the college; his name no longer appeared on the active role of Phi Beta Kappa at its fourth anniversary celebration held on December 5, 1780.

After attending George Wythe's lectures at William and Mary, John Marshall obtained a law license and went into private practice. Washington resolved to continue the study of law. Not yet twenty years of age, he may have considered himself too young to embark on a legal career.

In Bushrod's plans to continue his legal education, we see early evidence of a special relationship with his uncle. As mentioned above, Bushrod was the eldest son of George Washington's eldest brother. It was natural under the mores of the day for him to be the object of the first President's interest and largesse. But the relationship went far beyond this. Bushrod corresponded regularly with his uncle, soliciting and following his advice, and was a frequent guest at Mount Vernon. From the headquarters of the Continental Army in March of 1782, General Washington wrote to James Wilson, asking him to take his nephew into his law office as an apprentice. Wilson, a Scottish immigrant and ardent proponent of

79 See ANNIS, supra note 2, at 26.
80 1 BEVERIDGE, supra note 12, at 158.
81 See id.
83 See id. at 36.
84 See id.
85 See ANNIS, supra note 2, at 29.
86 See 1 BEVERIDGE, supra note 12, at 161.
87 See CUSTER, supra note 82, at 37.
88 See id.
89 See ANNIS, supra note 2, at 36.
90 See id.
91 See BINNEY, supra note 20, at 7.
92 See id.
93 See CHARLES PAGE SMITH, JAMES WILSON, FOUNDING FATHER 170 (1956).
American independence, had built a thriving practice in Philadelphia and a reputation as one of America’s premier lawyers. He wrote to General Washington that he would accept his nephew — at a fee of one hundred guineas. The high fee may have been Wilson’s method of discouraging the arrangement without saying no to the General. If so, his strategy did not work; Washington promptly sent Wilson a promissory note for the fee and recommended his nephew to Wilson, not only as a student, but also as a friend.

General Washington worried that his nephew might fall victim to the worldly temptations of the city upon his move to Philadelphia. In January he wrote to Bushrod advising him to adopt eminence in the legal profession, not mere study of the law, as his object. Seek honor and profit, the General advised, adding that “dissipation is incompatible with both.” Jared Sparks, an early collector of George Washington’s papers, called this “one of the wisest and discreetest letters ever written by father to son” and “worthy to be recorded in letters of gold.” The General had no cause for worry; his nephew embarked on a course of study so arduous that it impaired his sight, eventually causing, in 1797, the loss of an eye.

Bushrod’s sojourn in Philadelphia was not without difficulty. His father, John Augustine Washington, had agreed to pay his son’s living expenses if the General could discharge Wilson’s fee. John Augustine Washington was landed and socially prominent, but he must have been short of ready cash. In 1782, a hemp crop failed and he was unable to pay his son’s living expenses. At the same time he advised his son not to draw on letters of credit he carried written by his uncle. As a result, Bushrod was forced to change his lodgings, his landlord threatening to detain his personal effects for back rent. Only a personal loan from

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94 See id. at 128.
95 See id.
96 See id. at 170.
97 See id.
98 See id.
99 See ANNIS, supra note 2, at 36.
100 See id.
101 Id. at 37.
102 BINNEY, supra note 20, at 7.
103 See WHITE, supra note 15, at 347.
104 See ANNIS, supra note 2, at 34.
105 See id. at 40.
106 See id.
107 See id.
108 See id.
a friend got him through the crisis. These dark days had a positive ending, however, for Bushrod was taken in by the Wilsons.

James Wilson had immigrated to Philadelphia after struggling as an impecunious "terner," a student of the bottom social rank, at St. Andrews University. With the financial assistance of a cousin, he had studied law under John Dickinson in Philadelphia and gained admission to the bar. Thus, Wilson had a common-law legal education, even though he came from Scotland, a civil law jurisdiction. He quickly became a prominent and successful lawyer and a leader in the movement for American independence. Wilson had served as a Pennsylvania delegate to both the Continental Congress, which issued the Declaration of Independence, and the convention which framed the Constitution. He would be appointed by President Washington to the first Supreme Court.

Bushrod Washington could hardly have had a better mentor. Wilson possessed a large and varied library and a circle of close and congenial friends. The relationship between Wilson and his young apprentice ripened into a personal friendship which would last their lifetimes. Long after Wilson's death, William Johnson asserted in his biography of Nathaniel Greene that Wilson had been a member of the "cabal opposed to General Washington" during the Revolution. Bushrod, Johnson's colleague on the Supreme Court by that time, joined Wilson's son in setting the record straight. Johnson, a stubborn man who hated to admit it when wrong, issued a public apology.

It is impossible to know exactly what Wilson taught Bushrod Washington. We find Wilson's legal philosophy expressed in law lectures delivered at the College of Philadelphia beginning in 1789 and his opinions as a Justice of the United States Supreme Court. Both occurred long after Washington was his student and we cannot be sure the theories expressed there were fully developed in 1782.

109 See Annis, supra note 2, at 40.
110 See Smith, supra note 93, at 210.
111 Id. at 14.
112 See id. at 24.
113 See id. at 46.
114 See id. at 78-82, 217-19.
115 See Smith, supra note 93, at 305.
116 See Annis, supra note 2, at 38.
117 See Smith, supra note 93, at 210.
118 See id.
119 See White, supra note 15, at 337.
120 See id.
121 See id.
122 See Annis, supra note 2, at 39.
In general, Wilson viewed the universe as governed by immutable rules. Among these rules were the precepts of natural law ordained by God to govern the conduct of men. A function of law was to discover and implement these immutable rules, and the study of history and metaphysics was the key to discovery of the rules. Wilson questioned Blackstone’s definition of law as the command of a sovereign. He believed legitimate authority to flow upward from the will of the people, not downward from the king.

To Wilson, the people’s will as expressed in the Constitution was different from their will as expressed in legislative enactments. Legislatures were subject to capture by factions representing narrow, selfish interests. Americans of Wilson’s day had come to distrust the state legislatures which seemed to be constantly changing the rules. In Chisholm v. Georgia, Wilson developed the premise that all political power was derived from the people who had expressed their will in the Constitution. Wilson unquestionably believed judicial review to be the mechanism whereby the people’s will as expressed in the Constitution would be protected from legislative interference. In the debates at the constitutional convention he took the position that, if Congress exceeded the powers vested in it, the courts would declare its action null and void.

Wilson’s themes reemerge in the opinions of Bushrod Washington. The concept that law is a set of immutable rules which can be “discovered” through study, the notion that a written constitution expresses the sovereign will of the people, and the doctrine of judicial review are all there. Although we do not know exactly what Wilson taught Washington, it is apparent his influence was significant.

In the spring of 1784 Bushrod Washington returned to Virginia and was admitted to the bar. In June he took a month and accompanied his uncle on a tour of the President’s western lands undertaken to collect rents, remove trespassers, and consider prospects for further speculation. On this trip Bushrod may have gained an understanding of the chaotic state of western land titles which would influence his decisions three decades later.

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123 See id. at 38.
124 See id. at 39.
125 See SMITH, supra note 93, at 320.
126 See ANNIS, supra note 2, at 39.
127 See id.
128 2 U.S. (2. Dall.) 419 (1793).
129 See GOEBEL, supra note 70, at 731.
131 See id. at 332-33.
132 See Washington, supra note 67, at 330.
133 See ANNIS, supra note 2, at 44.
Bushrod practiced law for several years in his native Westmoreland County, which he represented in the Virginia General Assembly and in the convention that ratified the federal Constitution.\textsuperscript{134} At the Virginia Convention, the federalist party led by Governor Edmund Randolph, James Madison, and John Marshall confronted the opponents of ratification, including George Mason and Patrick Henry.\textsuperscript{135} The supporters of the new Constitution had devised their strategy in advance and presented a united front.\textsuperscript{136} Their opponents waged a disorganized, piecemeal attack.\textsuperscript{137} Moreover, one of the anti-federalists’ best advocates, Bushrod’s old benefactor Richard Henry Lee, was absent due to ill health.\textsuperscript{138} In the end, Madison’s calm reasoning carried the day over Henry’s emotional attacks. Bushrod, firmly in the federalist camp, was present for each vote, but apparently did not speak on the floor during the debates.\textsuperscript{139} The contrasting styles of Madison and Henry must surely have made an impression on the young delegate.

Bushrod’s law practice in Westmoreland County apparently fell short of expectations.\textsuperscript{140} He also found practicing law and attending to the plantation he had inherited on his father’s death to be in irreconcilable conflict.\textsuperscript{141} He wrote to his uncle in November, 1788, that “it is necessary to relinquish my farm or my profession.”\textsuperscript{142} That winter he selected law over agriculture, sold the farm, and moved to Alexandria.\textsuperscript{143}

In the summer of 1789, Bushrod made an effort to secure appointment as United States Attorney for Virginia in the new national government.\textsuperscript{144} He was rebuffed by his uncle, now President, who feared a charge of nepotism.\textsuperscript{145} The Alexandria practice proved unsuccessful and Bushrod determined to move again, this time to Richmond.\textsuperscript{146} It is not clear just when the move to Richmond occurred. One writer places it in 1792 based on reports of cases argued in the Supreme Court of Appeals of Virginia published some years later by Washington; these reports

\begin{footnotes}
\item[135] See \textit{Annis, supra} note 2, at 54.
\item[136] See \textit{Goebel, supra} note 70, at 377.
\item[137] See \textit{id.}
\item[138] See \textit{id.}
\item[139] See \textit{Annis, supra} note 2, at 56.
\item[140] See \textit{Washington, supra} note 134, at 4.
\item[141] See \textit{Annis, supra} note 2, at 57.
\item[142] \textit{Id.}
\item[143] See \textit{id.}
\item[144] See \textit{White, supra} note 15, at 346.
\item[145] See \textit{id.}
\item[146] See \textit{Annis, supra} note 2, at 60.
\end{footnotes}
begin with cases decided in that year.\textsuperscript{147}

In Richmond, the successful law practice, which had previously eluded Washington, was finally his.\textsuperscript{148} Immersion in the law was complete. A relative reported years later that “he continued a deep student of law, so absorbing and assimilating it into his nature that it became his possession.”\textsuperscript{149} Washington appears to have had few interests beyond his profession except for a life-long love of music and the popular novels of the day which he read aloud to his wife in the evenings.\textsuperscript{150}

Washington often argued in the Court of Appeals of Virginia at Richmond and he attended that court even when not counsel in the cases under consideration. He took copious notes of the proceedings for his own use, later publishing them as two volumes of \textit{Virginia Reports}. During this period Washington appeared in numerous cases with John Marshall, often as adversaries, but occasionally as co-counsel.\textsuperscript{151} Among his clients was Thomas Jefferson, who asked Washington to represent him in a chancery suit in 1795.\textsuperscript{152}

In the late summer of 1798, George Washington, now retired from the White House to Mount Vernon, became alarmed about the prospects of the Federalist Party in the approaching congressional elections.\textsuperscript{153} A weak Federalist candidate for Congress was willing to withdraw in favor of a stronger if one could be found.\textsuperscript{154} George Washington, eager to find such a candidate for his party, summoned his nephew and John Marshall to Mount Vernon.\textsuperscript{155} Senator Beveridge, in his biography of Marshall, tells what happened when the two friends, traveling together, arrived at Mt. Vernon:

For convenience in traveling, they had put their clothing in the same pair of saddle-bags. They arrived in heavy rain and were 'drenched to the skin.' Unlocking the saddle-bags, the first article they took out was a black bottle of whiskey. With great hilarity each charged this to be the property of the other. Then came a thick twist of tobacco, some corn bread, and finally the worn apparel of wagoners; at some tavern on the way their saddle-bags

\textsuperscript{147} See Custer, supra note 82, at 39.
\textsuperscript{148} See White, supra note 15, at 346.
\textsuperscript{149} Washington, supra note 67, at 330.
\textsuperscript{150} See Binney, supra note 20, at 8.
\textsuperscript{151} See Custer, supra note 82, at 39.
\textsuperscript{152} See Annis, supra note 2, at 62.
\textsuperscript{153} See 2 Albert J. Beveridge, \textit{The Life of John Marshall} 374 (1916-19).
\textsuperscript{154} See id.
\textsuperscript{155} See id.
had become exchanged for those of drivers.\textsuperscript{156}

Another version of the story has a servant, placed in charge of a portmanteau containing their clothes, mistakenly exchanging it for a similar one belonging to a Scottish pedlar.\textsuperscript{157} When the portmanteau was opened it contained, not clothes, but “cakes of Windsor soap and fancy articles of all kinds.”\textsuperscript{158} In both versions of the story, George Washington is said to have roared with laughter at the misfortune of his guests.

Under intense pressure from the first President, Marshall and Bushrod Washington agreed to participate in the upcoming election. Shortly thereafter, however, word came that Bushrod’s mentor, James Wilson, had died, creating a vacancy on the Supreme Court.

Five names were prominently mentioned for the appointment: Jacob Rush, Samuel Sitgreaves, and Richard Peters of Pennsylvania; and John Marshall and Bushrod Washington of Virginia.\textsuperscript{159} Rush appeared to be the best qualified. Born in 1747, he was the eldest and most experienced of the candidates.\textsuperscript{160} He also appeared to be the best educated, having graduated from Princeton in 1765 and London’s Middle Temple in 1771.\textsuperscript{161} Rush also had prior judicial experience as a Judge of the Superior Court of Pennsylvania.\textsuperscript{162} He withdrew his name, however, perhaps discouraged by the burden of travel the appointment would entail.\textsuperscript{163} Sitgreaves was at the other extreme and was eliminated as too inexperienced.\textsuperscript{164} Peters indicated that he would decline the appointment because of an inadequate salary and the onerous duties of the office.\textsuperscript{165} These problems with the Pennsylvania candidates proved not to be disconcerting to Adams. The President preferred someone from Virginia; that state had remained unrepresented on the court since Justice John Blair’s resignation in 1795.\textsuperscript{166} Marshall and Washington proved to be President Adams’ first and second choices for the position.\textsuperscript{167} Now committed to running for Congress, Marshall declined the appointment in favor of

\textsuperscript{156} Id. at 376.
\textsuperscript{157} See PAUL WILSTACH, MOUNT VERNON 210-11 (1916) quoted in ANNIS, supra note 2, at 66-67.
\textsuperscript{158} Id.
\textsuperscript{159} 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 153 (Rev. ed. 1926) [hereinafter WARREN, THE SUPREME COURT].
\textsuperscript{160} See id.
\textsuperscript{161} See id.
\textsuperscript{162} See id.
\textsuperscript{163} See id.
\textsuperscript{164} See WARREN, THE SUPREME COURT, supra note 159, at 153.
\textsuperscript{165} See id.
\textsuperscript{166} See id. at 154.
\textsuperscript{167} See WHITE, supra note 15, at 345.
his friend.\textsuperscript{168} Washington also received the strong support of Attorney General Charles Lee,\textsuperscript{169} an old friend of the Washington family and brother to Light Horse Harry Lee,\textsuperscript{170} who had been favorably impressed with Bushrod’s military service in the Revolution. As an experienced practitioner of law in Virginia,\textsuperscript{171} Attorney General Lee was no doubt familiar with the legal talents and temperament of Bushrod Washington. Though only thirty-six years old, Washington had already developed a reputation as a profound lawyer.\textsuperscript{172}

With the approval of his uncle, Bushrod withdrew from the congressional race and accepted the appointment.\textsuperscript{173} He was the first appointee of President Adams to the Supreme Court, the eleventh Justice to serve on the Court and was the youngest appointed to that time.\textsuperscript{174}

\section*{IV. Principal Opinions of Justice Washington: 1799-1829}

The federal judicial system in 1798, when Bushrod Washington became a Supreme Court Justice, was remarkably different from that of today. Three types of courts had been established by the Judiciary Act of 1789 — the Supreme Court, district courts, and circuit courts.\textsuperscript{175} Judges were provided for the Supreme Court and the district courts, but not for the circuit courts.\textsuperscript{176} Each state had at least one district court. Originally there were three circuit courts. The circuit courts were made up of the district judge of the district in which the circuit court sat and two justices of the Supreme Court.\textsuperscript{177} In 1793, the Judiciary Act was amended to require that only one justice attend each session of the circuit court.\textsuperscript{178} The Supreme Court justices therefore had to ride circuit — an onerous physical burden in those days.\textsuperscript{179} The number of circuits was frequently expanded, however, and additional justices were appointed, somewhat reducing the burden of circuit-riding.\textsuperscript{180}

Professor Wright summarizes the jurisdiction of the early courts as follows:

\begin{quote}
See Custer, supra note 82, at 42.
See Haskins & Johnson, supra note 14, at 97.
See Goebel, supra note 69, at 582.
See Warren, The Supreme Court, supra note 159, at 153-54.
See White, supra note 15, at 345-46.
See Annis, supra note 2, at 71.
See id.
See id.
See id. at 5.
See id.
\end{quote}
The district courts were entirely courts of original jurisdiction, authorized to entertain admiralty cases, minor criminal cases, and some other rather limited classes of cases. The circuit courts had both original and appellate jurisdiction. They were the court of original jurisdiction in diversity cases, most criminal cases, and larger cases to which the United States was a party. They had appellate jurisdiction over the district courts in civil cases where the amount in controversy exceeded $50 and in admiralty cases where the amount in controversy exceeded $300. The Supreme Court had some original jurisdiction, as the constitution provided, and had appellate jurisdiction over the circuit courts in civil cases where the amount in controversy exceeded $2,000, and over the state courts in cases raising a federal question. There was no review in the Supreme Court of federal criminal cases.181

For most of his career on the federal bench, Justice Washington was assigned to a circuit which included Pennsylvania and New Jersey. He held court in Philadelphia and Trenton, often sitting with Richard Peters, United States District Judge for the District of Pennsylvania. Reports of the early cases reveal that Washington and Peters sat together, not only in appellate cases, but also at trial. In jury trials, both would charge the jury, and their instructions were occasionally inconsistent. In fact, the practice of using multiple judges in jury trials was common throughout the country. "The circuit courts were courts of great power and dignity, and at an early time in our history brought home to the people of every state a sense of national judicial power through the presence of the Supreme Court Justices."182

After an initial tour of duty on the Southern Circuit, Washington was assigned in 1803 to the circuit made up of Pennsylvania and New Jersey183 where he remained for the balance of his judicial career.184

Washington probably welcomed the opportunity to return regularly to Philadelphia where he had been a law student years before. He apparently did not immediately make a mark, however, because of his unimposing appearance and his self-effacing personality. Horace Binney, one of the leading members of the Philadelphia bar,185 described his first encounter with Bushrod Washington as follows:

As I came in one day to dinner at my lodging-house, in North Third Street, I perceived sitting in the parlor a new comer, of about the common height, of slight figure, sallow complexion, and

181 WRIGHT, supra note 175, at 4.
182 REDISH, ET AL, supra note 180, at 100 app. at 11.
184 See id.
185 WHITE, supra note 15, at 300.
straight brown hair, the features of his face generally small, one of his eyes apparently sightless, and the other having more than the fire of an ordinary pair. His chin was nearly or quite beardless, and it was to this, rather than to his other traits, that he owed the expression there was about him, of being an old young man, or a young old man—it was difficult at first to tell which—an expression that to some degree continued till his death. This was BUSHROD WASHINGTON, a nephew and to some extent the `el'eye of General Washington, and the son of John Augustine Washington, General Washington's younger brother. Judge Washington had just arrived and taken lodgings at the same house. I soon found that he was easy in his manners, and affable, unaffected, unpretending, and as far as possible from stateliness. I could hardly believe that he was a Judge of the highest Court in the land.  

Bushrod Washington authored eighty-one separate opinions as a Supreme Court Justice which are reported in volumes 3 Dallas through 2 Peters of the Supreme Court Reports. Between 1826 and 1829 Richard Peters, Jr., the son of Washington's colleague on the federal bench, published Washington's circuit court decisions. These cases, over 500 in number, were compiled principally from Washington's own notes. The practice on circuit was apparently to deliver the opinions orally from rough notes. Many of the circuit opinions are summaries of instructions in jury trials. These are often no more than cursory outlines of charges which must have been much longer when actually delivered. There are, however, many opinions which contain insights into Washington's judicial principles and decisional processes. When these are combined with the Supreme Court opinions, a reasonably clear impression of Washington the justice emerges. As noted above, I have selected cases in four categories which are representative of Washington's work and the way he approached the compelling legal issues of his day. Discussion of these cases follows.

A. Constitutional Litigation

Invariably, new nations are confronted with "the stress of national self-definition." The United States was no exception. Competing notions of political power, economic theory, and the role of the military divided the country. Federalists wanted a strong national government, a commercial society, and a powerful army and navy. Conversely, the Republicans preferred power diffused to the states, an agrarian economy, a weak army and no sea-going navy at all. In the ongoing struggle between Britain and France, Americans tended to choose sides along party lines. Republicans, still harboring resentment against Britain for the

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186 Binney, supra note 20, at 6-7.
188 Elkins & McKitrick, supra note 170, at 78.
Revolutionary War, and infatuated with the stated principles of the French Revolution, sided with France. Eschewing all things British, they secured in some states passage of legislation forbidding citation of English authorities in their courts.\(^\text{189}\) Among the Federalists, however, Anglophilia remained strong as did fear of the French Revolution and "mob rule."

Constitutional cases decided during Justice Washington’s tenure on the Supreme Court arose in large part from this struggle between competing ideologies. At first, the Federalists had the upper hand. With the exception of 1793-95, when the Republicans held a brief majority in the House of Representatives,\(^\text{190}\) the Federalists dominated all three branches of the national government before 1801. State resistance to the federal government, which later came to be identified with the defense of slavery and the movement for Southern independence, was not, at first, confined to a single region. Republican opposition in Pennsylvania, for example, was asserted on several fronts in what has been called the "Pennsylvania Rebellion."\(^\text{191}\)

Judges, to their peril as it turned out, were drawn into this struggle. Washington, as the Circuit Justice sitting in Philadelphia, found himself at the center of the storm. Washington brought to the controversy a decidedly Federalist concept of the role of the courts. His seriatim opinion in the early case of Cooper v. Telfair\(^\text{192}\) is revealing. The case was a diversity action to collect a debt. The defendant contended that Cooper, the plaintiff, was barred from pursuing the case by a Georgia statute attainting those who had adhered to the British side during the Revolution; Cooper having taken up arms with the British troops. Cooper argued that the statute was void under the Georgia Constitution. In a very short seriatim opinion, Washington refused to hold the statute unconstitutional because he found no express constitutional provision to apply. "The presumption, indeed," he said, "must always be in favor of the validity of laws, if the contrary is not clearly demonstrated."\(^\text{193}\) Washington’s position is clear — the Court has the power to declare legislation unconstitutional, but must do so only when the case is relatively free from doubt. This is essentially the position developed by Alexander Hamilton in Federalist No. 78.\(^\text{194}\) The Constitution is fundamental law representing the sovereign will of the people; as such, it takes precedence over inconsistent actions of the legislature. The Court, as the representative of the people, is to strike down legislation, however, only when there is an "irreconcilable variance between the two."\(^\text{195}\) One writer has argued that, although the early judges generally accepted the doctrine of judicial review, they knew it had to be exercised sparingly.

\(^{189}\) See Friedman, supra note 66, at 97-98.


\(^{191}\) Haskins & Johnson, supra note 14, at 317.

\(^{192}\) 4 U.S. (4 Dall.) 14 (1800).

\(^{193}\) Id. at 15.

\(^{194}\) The Federalist No. 78 at 506 (Alexander Hamilton) (Modern Library ed. 1937).

\(^{195}\) See id.
Otherwise, their authority would collapse.\textsuperscript{196} This theory of judicial review, which Professor Bickel referred to as "the rule of the clear mistake,"\textsuperscript{197} was the generally accepted notion of the doctrine during the first one hundred years of the republic.\textsuperscript{198}

Many Federalist judges did not exercise the caution called for by the Federalist theory of judicial review. As the Republicans gained strength, the bench, populated with appointees of Presidents Washington and Adams, struck back. Appalled by the prospect of a Republican takeover, they used their positions to promote Federalist principles.\textsuperscript{199} The extreme example was Justice Samuel Chase who decorated his jury instructions with long attacks on Republican doctrine, and who left the bench to campaign actively for Federalist candidates in elections.\textsuperscript{200} Federalist judges openly adopted legal constructions which would serve to expand federal power. One such doctrine was the concept that common law crimes could be prosecuted in federal court in the absence of enabling legislation by Congress.

Fear of judicial activism motivated opposition to the doctrine of federal common law crimes. Losers in political battles were afraid they would be prosecuted by United States Attorneys, and sentenced by judges, appointed by the winners. Using the doctrine of common law crimes, creative prosecutors and judges could find ways to get even with their political enemies.

An incident in 1799 involving Alexander Martin, firebrand editor of the Republican \textit{Baltimore American}, illustrates the political controversy of the day which had spilled over into the federal courts. Martin reported in his November 8 edition of that year:

Yesterday the Federal District Court was opened in this city. Judge Washington addressed the Jury, and I am told he exceeded Brooks in stupidity and Harper in malignity. The chief object of his speech appeared to be aimed against the republicans; he declared in the course of his spouting that "he who did not support the present administration, ought to be deprived of the privileges of an American citizen."\textsuperscript{201}

Two days later Martin begrudgingly printed a retraction, admitting he had not been present and asserting that his remarks about Washington "were hastily


\textsuperscript{197} ALEXANDER M. BICKEL, \textit{THE LEAST DANGEROUS BRANCH} 35 (1962).

\textsuperscript{198} \textit{See} James B. Thayer, \textit{The Origin and Scope of the American Doctrine of Constitutional Law}, VII \textit{NO. 3 HARV. L. REV.} 17 (1893).

\textsuperscript{199} \textit{See} HASKINS & JOHNSON, \textit{supra} note 14, at 217.

\textsuperscript{200} \textit{See id.}

\textsuperscript{201} 3 \textit{DOCUMENTARY HISTORY OF THE UNITED STATES SUPREME COURT}, 1789-1800 at 399 (Maeva Marcus ed., 1985). "Brooks" and "Harper" were federalist members of Congress from New York and South Carolina, respectively. \textit{Id.} Martin was confused about the court— it was the circuit, not the district, court.
sketched from hearsay.”

Martin had before him the example of Justice Chase, who was from Maryland, and he may have assumed Washington would deliver a charge to the grand jury similar to those characteristic of Chase. At any rate, he had to take back his remarks, attributing them to “misinformation, and not to any intentional wish to injure the feelings of the judge or his friends, or bestow undeserved censure. . . .”

In contrast to other judges and justices, Washington did not engage in partisan activity from the bench. He did, however, campaign openly for Federalist Charles Coatsworth Pinckney, Hamilton’s candidate for President in 1800. (One of the things which cost President Adams re-election in 1800 was his break with Hamilton and the ensuing split in Federalist ranks; in supporting Pinckney, Washington opposed the President who had appointed him to the Supreme Court.) Washington’s opinions sometimes reveal Federalist dogma, such as the notion of common law crimes. In an 1804 prosecution for perjury allegedly committed in a bankruptcy proceeding, he charged the jury: “Every offense for which a man is indicted, must be laid against some law, and it must be shown to come within it. Such law may be the general unwritten or common law, or the statute law.”

The election of 1800 was the first “realignment election” in American history. The Republicans gained the presidency and both houses of Congress. The judiciary, however, remained firmly in control of Federalist judges with lifetime tenure. Parallel situations existed in some states, such as Pennsylvania, where Federalist judges blocked Republican legislative and executive initiatives.

The Republicans, believing the will of the people to be on their side, moved promptly to oust the Federalist judges by impeachment. At the national level, they succeeded in removing U.S. District Judge John Pickering, and in bringing Justice Chase to trial in the Senate. In Pennsylvania, Judge Alexander Addison was impeached by the House of Representatives and, on January 26, 1803, convicted by the state Senate and removed from office. Other Pennsylvania judges were brought to trial in January, 1805, but the effort to convict them narrowly failed in the state Senate.

Further impeachments were planned. The Republicans were firmly resolved to complete their revolution by replacing the Federalist judges with friends.

202 Id. at 400-01.
203 Id. at 401.
204 See WARREN, THE SUPREME COURT, supra note 159, at 275.
205 See Anonymous, 1 F. Cas. 1032 (C.C.D. Pa. 1804).
206 Id. at 1034.
209 See BEVERIDGE, supra note 208, at 164.
210 See ADAMS, supra note 42, at 450.
of the new administration.\textsuperscript{211} United States District Judge Richard Peters, who regularly sat with Washington on circuit, was one of the targets.\textsuperscript{212} The Federalist judges were shaken. Chief Justice Marshall himself, called to testify in the trial of Chase, appeared to eye-witnesses to be frightened.\textsuperscript{213} Judge Peters was intimidated. Washington was certainly a potential target, and he revealed his apprehension in a sympathetic letter to Chase.\textsuperscript{214} Henry Adams, in a cryptic reference, observes that the punishment of Thomas Passmore for contempt was to be a ground for impeachment of the Supreme Court judges of Pennsylvania.\textsuperscript{215} A second report of the case of Anonymous referred to above, in which Washington had adopted the common law of crimes, shows the defendant to have been one Thomas Passmore.\textsuperscript{216} The common law crimes doctrine was anathema to Republicans. Had Passmore been convicted under instructions by Washington and Peters that perjury was a common law crime, the Republicans might have had their ground for impeachment. Washington escaped from the trap by also charging the jury that congressional repeal of the bankruptcy law providing for the proceeding in which Passmore had allegedly perjured himself was an absolute bar to the prosecution.\textsuperscript{217} This result is difficult to understand, apart from the impeachment threat. Passmore was charged with lying under oath in a federal bankruptcy proceeding; if perjury were a crime at common law, it is hard to see how later repeal of the bankruptcy act could save him. Washington's charge, therefore, may have been designed to give lip service to the doctrine of common law crimes while insuring, at the same time, that Passmore would be acquitted.

Peters had a reputation for caution;\textsuperscript{218} it is not surprising that he avoided confrontation with the Republicans. If, on the other hand, Washington had dodged the impeachment bullet in Passmore by compromising his instructions, his lack of courage was totally uncharacteristic. Horace Binney, of the Philadelphia bar, described Washington's normal demeanor: "[H]e was as cool, self-possessed and efficient at a moment of high excitement at the Bar, or in the people, as if the nerves of fear had been taken out of his brain by the roots."\textsuperscript{219} Similarly, his obituary in the Supreme Court Reports asserts: "[T]he fear of man never fell upon him; it never entered into his thoughts, much less was it seen in his actions."\textsuperscript{220}

\textsuperscript{211} 3 BEVERIDGE, supra note 208, at 161-81.
\textsuperscript{212} See id. at 172 n.1.
\textsuperscript{213} See id. at 192.
\textsuperscript{214} See HASKINS & JOHNSON, supra note 14, at 232.
\textsuperscript{215} See ADAMS, supra note 42, at 409.
\textsuperscript{216} See United States v. Passmore, 4 U.S. (4 Dall.) 372 (C.C.D. Pa. 1804).
\textsuperscript{217} See id.
\textsuperscript{218} Senator Beveridge describes Peters as "a good lawyer and an upright judge, but a timorous man."
\textsuperscript{219} BINNEY, supra note 20, at 11.
\textsuperscript{220} Obituary, 28 U.S. (3 Peters) ix.
The greatest example of Washington’s courage under fire occurred in *United States v. Bright.* The case arose out of the notorious “Olmstead affair,” one of the federal-state conflicts which together made up the “Pennsylvania Rebellion.” The Olmstead controversy, also referred to as the case of the *Sloop Active,* had a long and convoluted history. Gideon Olmstead, a sailor from Connecticut, was captured by the British during the Revolutionary War, impressed into the British Navy, and forced to serve on board the sloop Active. Olmstead and other American members of the crew seized control of the Active and sailed for New Jersey, the nearest friendly shore. Off New Jersey, the Active was captured by the Convention, a sloop-of-war in service of the State of Pennsylvania. A libel was filed in the Pennsylvania Court of Admiralty, a state admiralty court, by the master of the Convention who claimed the Active as a prize. Olmstead and his compatriots filed a claim in the suit contending the Active was their prize. A jury returned a verdict giving one-quarter of the Active’s value to Olmstead and his associates and the remaining three-quarters to the other claimants. An appeal was taken to a federal court established by the Continental Congress to consider appeals from state admiralty courts. That court reversed the state court award and held Olmstead and his associates entitled to the full value of the vessel. The Active was sold, but the marshal paid the money into the state admiralty court and the funds were eventually handed over to David Rittenhouse, State Treasurer of Pennsylvania. Pennsylvania refused to relinquish its share of the award, about 11,500 pounds, to Olmstead.

There followed a long struggle between Pennsylvania and the federal government over whose courts were entitled to resolve the matter. *Olmstead v. The Active* was tried before Judge Peters in December 1802. The Governor of Pennsylvania refused to obey Peters’ judgment in favor of Olmstead. Republican newspapers supported the state in its defiance of federal authority. Judge Peters, perhaps fearing impeachment, declined to enforce his judgment until ordered to do so by the United States Supreme Court. Pennsylvania’s defiance of the ensuing writ led to an armed face-off between United States Marshals and the Pennsylvania militia commanded by Brigadier General Michael Bright. Bright drew up his troops around the house of Rittenhouse’s executrixes who had become reluctant stakeholders in the matter. The stand-off melted away when some members of the

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221 24 F. Cas. 1232 (C.C.D. Pa. 1809).

222 Between 1790 and 1820 states rights advocates in Pennsylvania resisted growing federal power in a series of cases. Because he regularly sat as a Circuit Judge in Philadelphia, Washington was drawn into most of these quarrels. For an overview of the Pennsylvania Rebellion, see HASKINS & JOHNSON, supra note 14, at 317-36.


224 *See* Carson, *supra* note 223, at 18.

225 18 F. Cas. 680 (D.C. Pa. 1803).

226 *See* HASKINS & JOHNSON, *supra* note 14, at 326.

militia, threatened with federal treason charges, refused to serve, and others were
drafted by the marshals into a *posse comitatus* to help them execute Peters’ writ.\textsuperscript{228}

A federal grand jury subsequently indicted Bright and other officers of the
Pennsylvania militia for resisting the laws of the United States. The case came on
for trial before Washington in an atmosphere of high public agitation.\textsuperscript{229} Bright’s
defense posed three legal issues. He first contended that Judge Peters’ writ was
void because a federal court had no power to reverse the decision of a state
admiralty court.\textsuperscript{230} Next, he argued that, because Pennsylvania claimed an interest
in the subject of the underlying dispute, the case was one to which the state was a
party and therefore barred by the Eleventh Amendment.\textsuperscript{231} Lastly, he claimed
immunity from prosecution because he was “just following orders” — here the
directions of the Governor.\textsuperscript{232} Washington swept aside all three points in his charge
to the jury.\textsuperscript{233} The first issue had been settled by the Supreme Court in *Penhallow v. Doane’s Administrators*,\textsuperscript{234} which upheld the power of federal appeals courts to
review decisions of state admiralty courts even in cases where the judgments were
based on jury verdicts. Washington’s instructions to the jury on this point contain
an eloquent tribute to the value of precedent:

Miserable, indeed, must be the condition of that community where
the law is unsettled, and, decisions upon the very point are
disregarded, when they come again, directly or incidentally, into
discussion. In such a state of things good men have nothing to
hope, and bad men nothing to fear. There is no standard by which
the rights of property, and the most estimable privileges to which
the citizens are entitled, can be regulated. All is doubt and
uncertainty until the judge has pronounced the law on the
particular case before him; but which carries with it no authority
as to a similar case between other parties.\textsuperscript{235}

On the second point, Washington explained that the State of Pennsylvania
was not a named party to the case and, even if it had been party to the underlying
suit (which it had not), that case was not under review in the present action.
Additionally, the admiralty appeals court had, by giving the entire interest in the
property to Olmstead and his associates, extinguished any state claim.

\textsuperscript{228} See HASKINS & JOHNSON, *supra* note 14, at 329.

\textsuperscript{229} Feelings against the national government were magnified by opposition to the federal Embargo

\textsuperscript{230} See 24 F. Cas. at 1234.

\textsuperscript{231} See *id.* at 1235.

\textsuperscript{232} See *id.* at 1237.

\textsuperscript{233} See *id.* at 1238.

\textsuperscript{234} 3 U.S. (3 Dall.) 54 (1795).

\textsuperscript{235} 24 F. Cas. at 1235.
On the final point, Washington delivered a ringing defense of federal supremacy. Bright, he said, was "bound by a paramount duty to the government of the Union" and should not have obeyed the Governor's unlawful mandate. What if the state had court-martialed him for refusing the Governor's order? Then, Washington said, he "ought to have been acquitted, upon the ground that the orders themselves were unlawful and void, and we ought, of course, to suppose that [he] would have been acquitted."\textsuperscript{237}

The facts were not in dispute and, as a result, Washington's charge to the jury was tantamount to directing a verdict of guilty. But feelings against the federal government remained high, even among the jurors, and they hesitated. The jury deliberated for three days, unable to agree.\textsuperscript{238} When two of them complained they were ill, Washington sent them a doctor.\textsuperscript{239} Finally, they returned a special verdict, concluding that the defendants had knowingly obstructed the marshals, but had done so under the orders of the constituted authorities of the State of Pennsylvania.\textsuperscript{240} If the court is of the opinion that the law upon such facts is for the United States, said the jury, the defendants are guilty; but if the law is for the defendants, they are not guilty.\textsuperscript{241}

Joseph Hopkinson, who would succeed Peters as District Judge, was present and he told what happened next:

\begin{quote}
[T]he court sitting in the upstairs room of the United States circuit court, Philadelphia, the room being too small for the vast concourse of anxious auditors, many of whom came to witness, as they expected, Judge Washington's discomfiture, the Judge, turning to the crier, said to him in the mildest and most composed way, "Adjourn the court, to meet tomorrow in the room on the ground floor of this building. This is an important case, the citizens manifest great interest in the result, and it is right that they should be allowed, without too much inconvenience, to witness the administration of the justice of the country, to which all men, great and small, are alike bound to submit.\textsuperscript{242}

The next day, in a larger room and before a great crowd, Washington adjudged the defendants guilty.\textsuperscript{243} He sentenced Bright to three months in jail and a
\end{quote}

\textsuperscript{236} Id. at 1237.
\textsuperscript{237} Id. at 1238.
\textsuperscript{238} See Carson, supra note 223, at 25.
\textsuperscript{239} See id. at 25-26.
\textsuperscript{240} See id. at 26.
\textsuperscript{241} See id. at 26
\textsuperscript{242} Washington, supra note 67, at 333.
\textsuperscript{243} See WARREN, THE SUPREME COURT, supra note 159, at 386.
$200 fine; the other defendants received lesser punishment.\(^{244}\) President Madison, who had supported the federal marshals throughout, immediately pardoned the defendants and the crisis was over.\(^{245}\) Many believed Washington would not dare to find the defendants guilty. But, said Hopkinson, such people “did not know him” and “were incapable of appreciating his rare moral and judicial qualities.”\(^{246}\)

Bushrod Washington was a silent partner of John Marshall in most of the great constitutional decisions handed down during his tenure on the Supreme Court. William Johnson, President Jefferson’s first appointee to the Court, complained in a letter to Jefferson that Marshall and Washington were so close they were “commonly estimated as one judge.”\(^ {247}\) The relationship was indeed exceptional. They had known each other since college and had been allies in many political wars before they became judges. Marshall was the person chosen by Bushrod to write the definitive biography of his famous uncle.\(^ {248}\) Although Marshall recused himself from Martin v. Hunter’s Lessee,\(^ {249}\) there is evidence to suggest he drafted the petition for a writ of error to the Supreme Court of Appeals of Virginia and arranged for Washington to sign it.\(^ {250}\) When Marshall wrote a series of anonymous letters defending the decision in McCulloch v. Maryland,\(^ {251}\) it was Washington who arranged for their publication in a Philadelphia newspaper.\(^ {252}\) Marshall’s younger son, James, was disciplined for breaking a window and displaying an improper attitude in chapel services at Harvard.\(^ {253}\) Marshall wrote to Washington seeking his help in placing James with a Philadelphia investment house. Apparently Washington came through for his friend — Harvard records indicate that, on May 2, 1815, James Keith Marshall withdrew to join the Philadelphia firm of Willis & Francis.\(^ {254}\) Marshall’s dependence on Washington embraced less serious matters as well. Washington’s connections with the world of commerce in Philadelphia enabled Marshall to keep his wine cellar in Richmond well stocked.\(^ {255}\) In 1810, Washington shipped a “half pipe” of Madeira to Marshall at the Chief Justice’s request — approximately 63 gallons of fortified wine.\(^ {256}\)

\(^ {244}\) See Carson, supra note 223, at 26.

\(^ {245}\) See Warren, The Supreme Court, supra note 159, at 386.

\(^ {246}\) Id. at 385-86.

\(^ {247}\) Haskins & Johnson, supra note 14, at 99.

\(^ {248}\) See Custer, supra note 82, at 43.

\(^ {249}\) 14 U.S. (1 Wheat.) 304 (1816).

\(^ {250}\) See White, supra note 15, at 165-66.

\(^ {251}\) 17 U.S. (4 Wheat.) 316 (1819).

\(^ {252}\) See Custer, supra note 82, at 44.


\(^ {254}\) See id. at 424.

\(^ {255}\) See id. at 396.

\(^ {256}\) See id.
The suggestion that Washington was dominated by Marshall’s stronger personality and intellect, however, is simply incorrect. The cases, particularly Washington’s circuit opinions appealed to the Supreme Court, demonstrate that Washington made up his own mind and did not always agree with Marshall. The frequency of their agreement is attributable to the similarity of their backgrounds and their consistent political philosophies. It was also a practice of the Marshall Court to create the appearance of unanimity when it did not in fact exist.\textsuperscript{257} Washington completely agreed with this policy. Dissents in ordinary cases, he believed, weakened the authority of the Court and were of no public benefit.\textsuperscript{258}

The bulk of Justice Washington’s significant writing on constitutional issues involved bankruptcy. The United States Constitution gives Congress the power to establish “uniform laws on the subject of bankruptcies throughout the United States.”\textsuperscript{259} Congress was slow to exercise this power. Only one federal bankruptcy act was passed during Washington’s tenure on the Court. This was promulgated in 1800 and was in effect only two and one-half years.\textsuperscript{260} Growing out of the financial panics of the 1790’s, the first federal act was quite restrictive. Only merchant-debtors were allowed benefit of the law and only creditors could initiate proceedings under it.\textsuperscript{261} At the state level, there was continuous pressure for debtor relief and the legislatures responded with a series of bankruptcy laws. As these laws multiplied, problems associated with them grew. Merchants did business across state lines, but the insolvency laws stopped at the borders.\textsuperscript{262} The state bankruptcy laws generally favored debtors, were poorly administered, and had unclear rules about preferences and priorities.\textsuperscript{263}

\textit{United States v. Fisher}\textsuperscript{264} arose under the short-lived Federal Bankruptcy Act of 1800. Peter Blight, who filed for bankruptcy under the act, had endorsed a bill of exchange which he later assigned. The bill of exchange was purchased by the cashier of the Bank of the United States for the Secretary of the Treasury. The United States sued for the full amount of the bill, claiming a preference under the bankruptcy act. A federal statute passed in 1797 had given priority to the United States in cases of insolvencies for all debts due the United States. The Bankruptcy Act of 1800 contained a provision reading “nothing 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 . . . .” When the case was tried in the circuit court, Washington charged the jury that the provision in the 1800 Act did not create a preference in the United States, but merely saved

\textsuperscript{257} See White, supra note 15, at 186; Stoner, supra note 16, at 331.

\textsuperscript{258} See id. at 349.

\textsuperscript{259} U.S. Const. art. I, § 8.

\textsuperscript{260} See Friedman, supra note 66, at 238.

\textsuperscript{261} See id.

\textsuperscript{262} See id. at 242.

\textsuperscript{263} See id. at 242-43.

\textsuperscript{264} 25 F. Cas. 1087 (C.C.D. Pa. 1803).
preferences previously granted. The 1797 Act, he continued, was for the sole purpose of settling accounts between the United States and receivers of public monies; it therefore created a preference only in bankruptcy cases involving such receivers. So instructed, the jury found for the defendants, and the government took the case to the Supreme Court on appeal.

The Supreme Court reversed, the Chief Justice writing the opinion. The words of the 1797 statute "taken in their natural and usual sense," he held, gave the United States priority in all cases of insolvency. He then went on to sound a theme which would reappear fully developed in McCulloch v. Maryland;\(^{265}\) to Fisher's argument that the Constitution granted Congress no specific authority to pass such a law, Marshall responded:

> It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or offices thereof.

> In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.\(^{266}\)

As Marshall's biographer points out, this was an express adoption of Hamilton's position on the power of Congress to establish a national bank and "an emphatic denial" of Jefferson's contrary opinion.\(^{267}\)

Washington had taken no part in the Supreme Court's decision because he had presided below, but he was constrained to publish a dissent. He explained, perhaps with false modesty:

> In any instance where I am so unfortunate as to differ with this court, I cannot fail to doubt the correctness of my own opinion. But if I cannot feel convinced of the error, I owe it in some measure to myself, and to those who may be injured by the expense and delay to which they have been exposed, to show at least that the opinion was not hastily or inconsiderately given.\(^{268}\)

> In a meticulous opinion, Washington then carefully examined the 1797 statute, demonstrating that its stated purpose, confirmed by the content and pattern of its specific sections, evinced a legislative intent to limit it to cases involving

\(^{265}\) 17 U.S. (4 Wheat.) 316 (1819). See also Stoner, supra note 16, at 335.

\(^{266}\) United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805).

\(^{267}\) See 3 BEVERIDGE, supra note 208, at 163.

\(^{268}\) Fisher, 6 U.S. (2 Cranch) at 398.
insolvency of public collectors. Washington did not address the issue of implied powers. As a Hamiltonian Federalist, it cannot be doubted that he agreed with Marshall on the point. He simply did not see a place for the doctrine in the case.

United States v. Fisher is one of several cases which demonstrate convincingly that Washington was not unduly influenced by Marshall. He had a mind of his own, and did not hesitate to disagree when he felt it appropriate. His rare dissents were saved for cases he felt important enough to breach the unanimity rule. In Golden v. Prince, Washington, sitting on circuit, held an 1812 Pennsylvania bankruptcy act to be unconstitutional as a law impairing the obligation of contracts. For him the issue was simple: "A law . . . which authorizes the discharge of a contract, by a smaller sum, or at a different time, or in a different manner than the parties have stipulated, impairs its obligation, by substituting for the contract of the parties, one which they never entered into . . . ."270

Washington made clear, however, that the constitutional infirmity existed only with regard to contracts already in existence at its passage. A law "prospective in its operation" would stand upon a different footing because the parties would have contracted with knowledge of its existence. For Washington, this prospective-retrospective distinction would remain a key consideration in constitutionality of insolvency laws. In Golden, he went beyond this issue to drive another nail into the coffin of state bankruptcy acts. The power granted Congress in the Constitution to legislate on the subject of bankruptcy, he contended, is exclusive, and the states have no power over the subject even if Congress declines to act. Washington feared state laws that "would be dissimilar and frequently contradictory."271 This theme would recur in Washington's opinions. In commerce crossing state and federal boundaries, he believed, potential litigants were entitled to consistent legal rules which would govern their conduct wherever it occurred.272 The decision alarmed the commercial public, however. They were concerned about Washington's position that state bankruptcy laws were precluded. Congress had been slow to act in the field of bankruptcy and, if the states could not pass insolvency laws, congressional inaction would mean there would be no debtor relief whatsoever.273

Five years later, in Sturges v. Crowninshield,274 the Supreme Court held a New York insolvency law unconstitutional. Because it acted to discharge a note given before its passage, it was a law impairing the obligation of contracts. In his opinion, Chief Justice Marshall rejected the argument that the federal bankruptcy power is exclusive. Washington did not dissent, although there is external evidence

269 10 F. Cas. 542 (C.C.D. Pa. 1814) (No. 5,509).
270 Id. at 544.
to suggest he did not abandon the contrary position he had taken in *Golden.*

In *Ogden v. Saunders,* the Supreme Court adopted the prospective-retrospective distinction and upheld a New York statute in a case involving discharge of an obligation incurred after the statute had been passed. Marshall dissented. Washington filed a seriatim opinion which has been described as a "blend of stubbornness and deference to precedent" and "a solid opinion" of "becoming modesty." Washington acknowledged that he had always believed the bankruptcy power to be exclusive, but he deferred to the contrary conclusion in *Sturgis* out of respect for precedent.

In *Mason v. Haile,* decided the same year as *Ogden v. Saunders,* Washington registered another of his rare dissents. The first paragraph of his opinion contains an apology for breaking ranks with his fellow justices:

> It has never been my habit to deliver dissenting opinions [he wrote] in cases where it has been my misfortune to differ from those which have been pronounced by a majority of this court. Nor should I do so upon the present occasion, did I not believe that the opinion just delivered is at variance with the fundamental principle upon which the cases of *Sturges v. Crowninshield* and *Ogden v. Saunders* have been decided.

A debtor, with the familiar-sounding name of Nathan Haile, had given a bond that he would remain in debtor's prison and not try to escape until lawfully discharged. Haile came within the ambit of an insolvency statute subsequently passed by Rhode Island and was released from prison. In an action on the bond, it was contended that the insolvency act was void as a law impairing the obligation of contracts. In an opinion by Justice Thompson, the Supreme Court held not. Washington's dissent takes the position that the majority has discarded the retrospective-prospective distinction which was the basis for the decision in *Ogden.*

The *Dartmouth College* case gets only a brief mention in a leading constitutional law text of today, but it was of pivotal importance in its time. The case framed the question whether the contract clause "constitutionalized protection for vested property rights." The case had a tortuous history and the Supreme

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275 See Currie, supra note 271, at 916.
277 WHITE, supra note 15, at 652.
278 Currie, supra note 271, at 917.
283 WHITE, supra note 15, at 612.
Court was deeply divided. The issue in the case was whether a New Hampshire statute seeking to "pack" the Board of Trustees by increasing its size violated the college's 1769 charter and was, therefore, a law impairing the obligation of contracts. In contrast to long opinions by Marshall and Story, Washington's separate opinion is direct and concise. He poses two simple questions: Is the 1769 charter a contract? If so, do the laws in question impair its obligation? He defines a contract as a transaction between two or more persons in which each incurs an obligation and acquires a right. A grant is a contract, he reasons, asserting that the point was decided in Fletcher v. Peck, and the creation of a corporation by charter "is . . . such a grant as includes an obligation of the nature of a contract."

Why did Washington write separately in Dartmouth College? Professors Blaustein and Mersky argue that he feared the consequences of Justice Story's separate opinion and aimed to lessen its impact. Story had written "a sweeping obiter dictum which brought all corporations under the Contract Clause . . . ." Perhaps also, he felt the case to be much simpler than the opinions of Marshall and Story suggest, and sought to diffuse the anticipated public reaction to the decision by placing it upon the clearest possible grounds.

The impact of the Dartmouth College case is summarized by Professor Remini as follows:

The importance of this decision became more and more apparent as the nation continued to develop into an industrial society. According to this very broad reading of the Constitution, states were severely limited in their authority over corporations, thereby allowing private entrepreneurs considerable leeway in their operations. In effect it helped promote economic expansion over the next several decades by protecting corporate activities from interference by local legislatures.

No consideration of Justice Washington's constitutional cases would be complete without reference to Corfield v. Coryell. This case is notorious for the confusion it has induced concerning the meaning of the privileges and immunities

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284 A lively history of the case is found at 4 BEVERIDGE, supra note 218, at 226-81.
286 See GUNTHER & SULLIVAN, supra note 282, at 506 n.3.
287 10 U.S. (6 Cranch) 87 (1810). In Fletcher, the Supreme Court had held a Georgia statute annulling a land grant made by a prior legislature to be invalid as a law impairing the obligations of a contract.
290 REMINI, supra note 285, at 161.
clause of Article IV, which reads: "The Citizens of each State shall be entitled to all of the Privileges and Immunities of Citizens of the several States."\(^{292}\) The phrase first appeared in the Articles of Confederation which stated that its purpose was "to secure and perpetuate mutual friendship and intercourse . . ." particularly with the rights of free ingress and egress, trade and commerce on the same terms as local citizens.\(^{293}\) The clause was thus intended as a prohibition against discrimination in favor of a state’s residents against non-residents. "[A] citizen from out-of-State would have the benefit of the laws as he found them, without discrimination against him as an outsider."\(^{294}\) This was the meaning of the clause accepted by the commentators such as Kent,\(^{295}\) and by Story himself.\(^{296}\)

Washington’s opinion in *Corfield* has been interpreted in modern times as attempting to introduce a "natural rights" philosophy of constitutional interpretation. Pursuant to this theory, courts would be free to give the clause specific content by holding that it protects fundamental rights which the courts would develop as specific cases arose. This was the gloss Justice Brennan, relying on Professor Tribe’s constitutional law treatise, put on *Corfield* in *Baldwin v. Fish & Game Commission of Montana,*\(^{297}\) where he said: "Mr. Justice Washington believed that the clause was designed to guarantee certain ‘fundamental’ rights to all United States citizens, regardless of the rights afforded by a State to its own citizens."\(^{298}\)

The facts of *Corfield* were simple. A New Jersey statute made it unlawful for non-residents to gather oysters in the rivers, bays, or waters of the state. Plaintiff, a citizen of Pennsylvania, was the owner of a vessel, the Hiram, which had been seized for violating the statute and sold to satisfy the fine imposed. Plaintiff sued to recover his vessel, claiming the seizure was unlawful. Among other arguments, he contended the New Jersey statute violated the privileges and immunities clause of Article IV. The case came on for trial before Washington on circuit, who submitted it to the jury subject to later opinion of the court on the legal issues. In an opinion setting aside a verdict for the plaintiff, Washington rejected the argument that the New Jersey statute violated the privileges and immunities clause. The following passage from the opinion, entirely dicta, has been quoted down through the years when courts and others have considered the meaning of the privileges and immunities of national citizenship:

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292 U.S. CONST. art. IV, § 2, cl. 1.
294 Id.
295 Id.
298 Id. at 395.
The next question is, whether this act infringes the section of the constitution which declares that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states?' The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions that are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which they may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) 'the better to secure the perpetual mutual friendship and intercourse among the people of the different states of the Union.'

In view of Washington's approach to judging expressed in his other opinions, his familiarity with the classic texts, and his general agreement with Story on constitutional issues, it is difficult to accept the proposition offered by Brennan and Tribe. In deciding that fishing a state’s oyster beds was not a privilege and immunity guaranteed to citizens who were residents of other states, Washington

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found his governing principle in Grotius. The sovereign, Grotius opines, has no dominion over wild beasts, birds and fishes which have not been caught, but the sovereign does have dominion over the lands and waters where the creatures are found. The sovereign may therefore restrict fishing and hunting in such lands and waters to its own citizens. The catalogue of specific privileges and immunities Washington lists are therefore more appropriately seen as examples of well-established rights a sovereign may not reserve exclusively to its own citizens, not as an open-ended invitation to courts to fill up the clause with specific rights which must be accorded to all based on natural law principles. Professor Fairman was closer to the mark when he said:

Doubtless Justice Washington’s words, as reported, far overleaped his thought. One should not suppose — because it would have been preposterous — that he meant that when the Framers carried forward the obligation assumed in the Articles of Confederation they widened it to charge each State to accord to citizens from sister States whatever the Supreme Court might hold to be “fundamental” in “free governments,” regardless of whether the State made any such provision for its own citizens. At any rate, it would have taken much more than a dictum from a Justice on circuit to establish such a proposition.

For Washington to author an opinion which confused rather than clarified the law was unusual, perhaps unique. We should remember the circumstances under which it was offered and the fact that Washington probably did not expect it to have a wide audience. The opinion was apparently delivered orally from the bench after a jury trial. By 1824, more and more cases were contained in published reports, but still not all circuit opinions were published. Corfield was among those opinions of Justice Washington reported by Richard Peters, Jr. who reconstructed the opinions after the fact relying on Washington’s notes and his own memory. Corfield does not fit into the paradigm of Washington’s Supreme Court opinions which were characteristically narrow, focused, tightly reasoned, and based on accepted authority. Perhaps the opinion attained its wide audience because it was for years the only significant judicial construction of Article IV’s privileges and immunities clause. At any rate, Corfield is not typical of Washington’s judicial work and it is unfortunate for his reputation that it survives as perhaps his best known opinion.

The constitutional cases reveal Washington’s Federalist principles, but also his faith in a republican form of government. It is apparent that he accepted

300 Id. at 548-52.
301 Id.
302 FAIRMAN, supra note 293, at 1123.
303 The case was tried to a jury in the April Term, 1823. It was argued on the legal issues presented in the October Term, 1824, and finally decided by Judge Washington at the April Term, 1825. See Corfield, 6 PR. Cas. at 550. Then, as now, justice could be slow and deliberate.
Wilson's proposition that power flows upward from the popular will. Because the Constitution is the expression of this popular will in its highest form, courts have the obligation to protect it from legislative interference. To preserve the legitimacy of the courts, however, the power of judicial review is to be exercised sparingly and only in clear cases. Similarly, as the bankruptcy cases disclose, he believed in the supremacy of the federal government and he preferred uniform rules to govern commercial matters.

The constitutional cases also show Washington to be a “team player” on the Supreme Court. He accepted Chief Justice Marshall’s view that the Court could enhance the authority of its decisions by speaking with one voice. Washington did not allow his loyalty to foreclose his obligation to make up his own mind, however. He did occasionally disagree with his colleagues, but he saved his separate opinions for cases he believed to be compelling.

B. Prize Law and Marine Insurance

In the late eighteenth and early nineteenth centuries maritime commerce was one of the most significant activities in which America engaged.\(^{304}\) Maritime law was, for the most part, an international system in which each nation followed the same rules. Early American courts considered the question whether they would follow the established international order or would develop a uniquely American approach to the issues presented. Britain was the principal naval and maritime commercial power of the era. Consequently, many of the generally accepted rules had been developed by the British admiralty courts. The tendency to accept these rules as binding clashed with American resistance to British authority which was an outgrowth of the Revolution.

It is ironic that Bushrod Washington, who grew up on a Virginia farm, became (with the possible exception of Joseph Story) the foremost maritime judge of the age. He apparently decided more marine insurance cases on circuit than any other justice.\(^{305}\) It is said that his duties on circuit gave him “an encyclopedic grasp of admiralty and maritime law” which earned him the respect and high opinion of Chief Justice Marshall in this area.\(^{306}\)

The entanglement of American shipping and commercial interests in the struggle between France and England produced a flood of prize cases. The United States quickly resorted to trade sanctions as a response to French interference with her commerce. The undeclared “Quasi-War” with France lasted two-and-a-half years from 1798 to 1800 and was confined to the sea, primarily in the West Indies.\(^{307}\) Congress passed three separate statutes, known as the Non-Intercourse

\(^{304}\) See White, supra note 15, at 884.


\(^{306}\) Haskins & Johnson, supra note 14, at 381.

\(^{307}\) Thomas A. Bailey, A Diplomatic History of the American People 95 (7th ed. 1964).
Acts, which restricted trade with France and her possessions.\textsuperscript{308} Problems were not, however, confined to France. In 1807, President Jefferson secured congressional passage of an Embargo Act against vigorous opposition from the New England states and the Federalist party.\textsuperscript{309} Directed at both England and France, the embargo prohibited virtually all exporting of American goods. The coasting trade was permitted, but shippers were required to post bonds which would be forfeited if the vessels engaged in foreign rather than coastal trade.\textsuperscript{310} Other embargoes followed leading to war with the British in 1812, a war with significant impact on American shipping and foreign trade. Litigation resulting from these trade restrictions and the War of 1812 continued long past the war’s end in 1815.

The maritime cases are particularly revealing with regard to the nature and sources of law in Washington’s day. The practice of publishing written case reports was virtually unknown until well after the Revolution.\textsuperscript{311} Early case reports were often compiled by lawyers, primarily for their own use, from notes taken while the judges were reading their opinions from the bench.\textsuperscript{312} Washington, himself, was one of the early reporters of cases decided by the Supreme Court of Appeals of Virginia and that is exactly the way he put together the bulk of his reports.\textsuperscript{313} He sat in court as the opinions were delivered from the bench, took notes, and reconstructed the opinions as best he could.\textsuperscript{314} The opinions of the Supreme Court of the United States were regularly published, but they were not published promptly — the process typically took months and sometimes years.\textsuperscript{315} Washington’s own circuit court opinions were published by Richard Peters, Jr., to whom Washington left his notes. Peters worked from the notes and his own memory (his father, a United States District Court Judge, had sat regularly with Washington on circuit). Many of Washington’s cases were not reported by Peters until decades after they had been delivered from the bench. In such an environment it is not surprising that the written reports were often inaccurate or incomplete.

As a result, written case law did not occupy the position of authority it enjoys today. Courts believed in the precedential value of the common law and sought to follow it, but they found evidence of the law in sources other than case reports.\textsuperscript{316} Commentaries and treatises were frequently used. The dearth of reported case law explains the immense popularity of Blackstone’s \textit{Commentaries} in the

\textsuperscript{308} Haskins \& Johnson, supra note 14, at 409-10.
\textsuperscript{309} Bailey, supra note 307, at 125.
\textsuperscript{310} See id.
\textsuperscript{311} See Friedman, supra note 66, at 102.
\textsuperscript{313} Custer, supra note 82, at 40.
\textsuperscript{314} Id.
\textsuperscript{315} See White, supra note 15, at 183.
\textsuperscript{316} See Friedman, supra note 66, at 102.
United States.\textsuperscript{317} Judges inherited a tradition binding them to explicit sources of law.\textsuperscript{318} To lawyers and courts legal authority was a hierarchy or pyramid. At the top was "fundamental law," the organic law establishing the basic principles of society. In America, this was the Constitution.\textsuperscript{319} In addition, courts spoke often of "positive law." Positive law was a system of specific rules laid down by an authoritative political entity. In America, positive law included, in addition to the Constitution, the acts of Congress and state legislatures. In cases where they were applicable, courts deemed themselves bound by positive law expressed in statutes unless it conflicted with the fundamental law as expressed in the Constitution. Positive law was seen as distinct from natural or moral law – principles of fundamental truth and basic right and wrong. Judges were expected to limit themselves to application of the rules of positive law where such rules existed.\textsuperscript{320} "[T]he tradition of positivism meant that the judge ought to be will-less."\textsuperscript{321} But what if an issue were not resolved by a specific provision of fundamental or positive law? In such cases courts were to "find" the applicable rule of decision by resort to natural or moral law. They looked to a myriad of sources as evidence of what the natural or moral rule should be. American law in the early Nineteenth Century was "an amalgam of seven discrete sources."\textsuperscript{322} Professor White summarizes these sources as follows:

In rough outline, and in descending order, the sources were the Constitution; the common law, which contained numerous subcategories within it; the law of nature, or of nations, a source of unwritten principles of natural justice; the civil law, which included not only principles established in civilian codes but the writings of civilian commentators; and specialized sources whose pertinence was restricted to discrete areas, such as equity, the law merchants as laid down in specialized mercantile courts in England and on the Continent, the lex loci, which referred to the local law of a jurisdiction on a matter particularly confined to that jurisdiction, the "law admiralty and maritime," as manifested in the decisions of the British and continental admiralty courts, and American federal and state statutes.\textsuperscript{323}

Statutes, as part of the positive law, "had a significant claim to authoritativeness,"

\textsuperscript{317} See id.


\textsuperscript{319} Id.

\textsuperscript{320} See id.

\textsuperscript{321} Id. at 29. See also generally The Federalist, No. 78, supra note 194.

\textsuperscript{322} White, supra note 15, at 112.

\textsuperscript{323} Id.
but only in those discrete situations to which they specifically applied.  

Courts would typically categorize the case with which they were dealing and look to authorities in that category for rules of decision. Often these authorities were treatises and commentaries rather than case law. The maritime cases illustrate this process. Here the category was admiralty, the sources wide-ranging and international, often including classic texts on natural law such as Grotius, Pufendorf and Rutherford. In many instances, the texts were more readily accessible than the cases.

One of Justice Washington's first opinions for the Supreme Court was in *Bas v. Tingy,* a case arising from the undeclared war with France. Tingy, as commander of the privateer "Ganges," filed a libel against the ship "Eliza," her cargo, and Bas, her master. The Eliza was an American ship captured by a French privateer on March 31, 1799. She was subsequently retaken by the Ganges exactly three weeks later on April 21, 1799. At issue in the case was an apparent conflict between two of the statutes passed in response to French naval depredations. The Act of June 28, 1798, required that any American vessel recaptured by a public armed vessel of the United States should be restored to her owners upon payment to the re-captors of one-eighth of the value of the vessel, its goods and effects. The Act of March 2, 1799, allowed salvage of one-eighth of the value if the ship were retaken from an "enemy" within twenty-four hours; this was increased to one-half if over ninety-six hours had elapsed between the original capture and the recapture. The Eliza had been in French possession for over ninety-six hours and Tingy claimed half her value, not one-eighth. He argued that hostilities with the French made France an "enemy" within the latter statute even though there had been no formal declaration of war, and, because the 1799 act covered the same subject as the 1798 act, the latter implicitly repealed the former. Bas responded that the 1798 act was specifically directed to commerce with France while the 1799 act was more general, establishing a permanent system of governance for the Navy. The latter act, he contended, would only apply to enemies in a "declared war."

In a seriatim opinion, Washington reasoned that France was an enemy within the terms of the 1799 act if a state of war existed. He concluded that there are two types of war: Declared, solemn and perfect war entailing complete hostilities between one nation and another; and imperfect war which is limited in nature and extent. In war of the second kind, the participants are confined by their "commissions" and can proceed no farther. By commission, he meant the specific parameters of any enabling legislation or executive directions relating to the specific conflict. He deemed the war with France to be of the second kind; it was war nevertheless and France an "enemy" within the act. The two statutes were

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324 *Id.*
325 *Id. at 37.
326 4 U.S. (4 Dall.) 37 (1800).
327 *Supra* note 318, at 10.
328 *See id.*
therefore in conflict and the last in point of time effectively repealed the earlier.329

One hundred and seventy years later, Bas v. Tingy was followed in an opinion upholding the constitutionality of the war in Vietnam.330 But the case had a more immediate impact; the Jeffersonian Republicans, still sympathetic to France, were outraged. Republican newspapers suggested for the first time that judges should be impeached for their decisions.331 As we have seen, this cloud on the horizon soon became a storm.

Croudson v. Leonard332 squarely presented the issue of whether the factual determinations of foreign courts of admiralty would be given preclusive effect in American courts. The brig “Fame” had attempted, on a voyage from Alexandria, Virginia, to break the British blockade of Martinique, a French island in the West Indies. The Fame was captured by a British ship, carried into Barbados and condemned as a prize by a British vice-admiralty court. The vice-admiralty court had found as a fact, necessary to support its order of condemnation, that the Fame had attempted to break the blockade.

The Fame’s owners had secured a policy of insurance and had warranted the vessel’s neutrality. Therefore, if the Fame had in fact attempted to break the blockade, the warranty of neutrality had been violated, voiding the policy. The owners sued the underwriters in the Circuit Court for the District of Columbia and obtained a jury verdict; the jury had therefore reached a conclusion opposite from the British vice-admiralty court on the question of whether the blockade had been violated. The underwriters appealed, arguing that the British vice-admiralty court’s finding precluded submission of the same issue to an American jury. Justice Johnson and Justice Washington wrote separate opinions for the Court reversing the verdict below. Washington went straight to the point:

This question upon this subject has long been at rest in England. The established law in the courts of that country is, that the sentence of a foreign court of competent jurisdiction condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided, that it can never be controverted, directly or collaterally, in any other court having concurrent jurisdiction.333

Washington reasoned that “all the world are parties in an admiralty cause.”334 The action was in rem, against the vessel, and thus any person from any jurisdiction can file a claim. Washington believed general rules of law applicable to

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329 See id.
332 8 U.S. (4 Cranch) 434 (1808).
333 Croudson, 8 U.S. (4 Cranch) at 436.
334 Id. at 437.
all and finality of decisions were goals of the law which should outweigh the possibility for "irregular and unjust judgments." Washington supported his conclusion with a review of English decisions since the reign of Charles II with particular emphasis on the views of Lord Mansfield.

The result in Croudson could hardly have been popular. Not only was a decision in favor of an American shipper reversed on the authority of a foreign court, but a jury verdict was overturned. Since the Revolution, Americans had maintained a particular affinity for juries as a bulwark against government abuse. As noted above, the Revolution also produced a significant negative reaction to English law. Several states passed statutes restricting the reception of English precedent in American courts. Most of these statutes provided that English cases decided since the Revolution would not be binding in the courts of the states. Kentucky went to the extreme, prohibiting in 1807 the mere mention of British cases decided since July 4, 1776. Washington was aware of this problem, of course, but he was determined not to let it frustrate the quest for international uniformity in maritime cases. He acknowledged that "English decisions have lost the weight of authority in the courts of the United States," but went on to say: "I do not hold myself bound by such decisions made since the revolution, although, as evidence of what the law was prior to that period, I read and respect them."

Another significant aspect of Croudson v. Leonard is a comment by Washington on the proper spheres of court and legislature in the development and application of law. Washington acknowledged that general principles and rules of law could produce unfair or unjust results in specific cases. It was up to the legislature to fix the problem, he suggested, "if the injustice of the belligerent powers, and of their courts, should render this rule oppressive . . . ." To him, the role of the Court was limited:

I hold the rules of law, when once firmly established, to be beyond the control of those who are merely to pronounce what the law is, and if from any circumstance it has become impolitic, in a national point of view, it is for the nation to annul or modify it.

Many other prize cases arising from the embargo and the Napoleonic Wars

335 Id.
336 See, e.g., the discussions in Federalist No. 83 at 544-45 (Alexander Hamilton) (Modern Library ed. 1937); and 1 Alexis De Tocqueville, Democracy in America 280-87 (Vintage Books ed. 1960).
337 See id.
338 Id.
339 See id. at 97-98.
340 Croudson, 8 U.S. (4 Cranch) at 438.
341 Id.
342 Id. at 442.
343 Id. at 442-43.
reached the Supreme Court. Washington frequently wrote opinions in these cases. Additionally, the Pennsylvania circuit was one of the busiest admiralty jurisdictions in America. Here, Washington often heard appeals in admiralty cases from the district court. The expertise he developed on circuit was put to use by the Chief Justice who assigned many opinions in admiralty cases to Washington.

The cases disclose the extent to which American ingenuity devised methods to subvert the embargo or avoid the British blockade. One method was to secure a clearance from one American port to another, post a bond under the Embargo Act, and then detour to a foreign port. The statutes recognized that deviations might be necessitated by weather or the dangers of the sea, and such a deviation if legitimate, was a defense to forfeiture under the act. See HASKINS & JOHNSON, supra note 14, at 422.

In *Brig James Wells v. United States*, the Court considered the burden of proof in a case of “deviation.” The James Wells had sailed from New England under a coastal clearance for St. Mary’s, Georgia, but actually traveled to St. Barts in the West Indies where it off-loaded a cargo of flour. The appellants had argued that stress of weather and the unseaworthy condition of the vessel had compelled them to travel to St. Barts and off-load the cargo in order to repair the ship. Once the cargo was unloaded, they contended, permission could not be obtained to reload it. In a short opinion for the Court, Washington recognized the strong temptation of merchants to violate the law and held that, when a deviation is shown, the shipowner has a very heavy burden to prove he comes within the exception. Washington found the evidence of the danger of continuing the original voyage to be “nowhere positively affirmed.”

When war broke out in 1812, numerous American vessels were abroad or at sea and, therefore, vulnerable to capture as prizes. John Quincy Adams, the American ambassador at St. Petersburg, encouraged American ships in Baltic ports to go to London and off-load their cargoes, obtaining British licenses for the return trip to the United States. Adams saw this as the only way the ships could get safely home through the British blockade. *The Joseph* rejected this as a defense to a claimed forfeiture for trading with the enemy. Citing British precedent and prior decisions of the Supreme Court, Washington conceded that the case was one of “peculiar hardship” but that the facts afforded “no legal excuse which it is competent to this court to admit as the basis of decision.” The vessel was deemed to be on one continuous voyage from the United States until her return; if she traded with the enemy during any part of that voyage, she was subject to seizure.
Similar on its facts to The Joseph was The Grotius, in which Washington again wrote for the Court. The Grotius was the first case argued in the Supreme Court by Daniel Webster, who appeared on March 12, 1814, as counsel for the claimants. Webster raised an issue of fact concerning validity of the capture and the Court continued the case for further proof. The following year, The Grotius was again up for decision and again Washington wrote for the Court. The Court reversed the judgment below which had condemned the Grotius to the United States, but rejected Webster's argument that there had been no capture; it was ordered that the ship be condemned to her captors as a lawful prize.

In The Venus, Washington returned to the theme of the Brig James Wells and wrote an opinion placing a heavy burden of proof on a merchant seeking to bring himself within an exception to rules requiring forfeiture. The Venus is one of the occasional cases in which Washington and Marshall differed. The Venus sailed for New York from Liverpool on July 4, 1812, without knowledge that the United States had declared war on Great Britain sixteen days before. On August 6, she was captured by an American privateer, taken to Massachusetts, and libeled as a prize in the district court. One of the owners of the ship, Maitland, a naturalized American citizen, had been born in Britain, and had returned there to live prior to the war. The principal issue was whether Maitland was domiciled in America or Britain; if British, the Venus was a lawful prize, but if Maitland were still an American domiciliary, he was entitled to the return of his property. Washington first looked to "writers upon the law of nations," particularly Vattel and Grotius, for a definition of domicile, and then reviewed decisions of the prize courts and the common law courts in England. He concluded:

If it sufficiently appear[s] that the intention of removing was to

351 Remini, supra note 285, at 119.
352 See The Grotius, 12 U.S. (8 Cranch) at 457.
353 In his recent biography, Professor Remini says that Webster, on his original appearance before the Supreme Court, won a rehearing and extra time for his clients, and that the following year the decision of the lower court was reversed. See Remini, supra note 285, at 119. While this statement is correct on its face, it creates the false impression that Webster won the case. In fact, the Court awarded the Grotius to her captors, not to her former owners whom Webster represented.
354 12 U.S. (8 Cranch) 253 (1814).
355 See id.
356 See id.
357 See id. at 253.
358 See id.
359 See The Venus, 12 U.S. (8 Cranch) at 254.
360 See id. at 255.
361 Id. at 278.
make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence even of a few days. This is one of the rules of the British Courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there *animo manendi*; and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence.\(^6\)

Washington then considered the consequences of acquiring a foreign domicile.\(^6\) He relied on Sir William Scott, a British admiralty law expert, and *The Indian Chief*,\(^6\) a decision of a British admiralty court, and held that, having acquired a foreign domicile the claimant “ought to be bound by all the consequences of it . . . .”\(^6\) The decision below upholding Maitland’s claim was reversed and the Venus was condemned to her captors.\(^6\) In a long opinion, the Chief Justice dissented.\(^6\) Marshall found the decisions of the British admiralty courts to be insensitive to the rights of neutrals and not in accord with “the view of international law taken by nations with less naval strength than Great Britain.”\(^6\)

Washington wrote for the Court in several other prize cases decided by the Supreme Court in 1814. In *The Frances (French’s Claim)*,\(^6\) Washington held that no lien upon enemy property would be recognized as an offset against the captors unless the lien was one recognized in international law independent of any contract between the consignee and the consignor.\(^6\) In practical effect, such cases made it very difficult for merchants to avoid the consequences of capture by contractual provisions with shippers.

*The Hiram*\(^6\) involved a device used by the British to attract commerce with Americans in spite of the war. Admiral Sawyer, in charge of the British fleet in the Atlantic, had written to the British consul in New York stating that he would not molest American vessels carrying dry goods to Spain and Portugal.\(^6\) The consul would then entice American merchants to ship goods to Spain and Portugal

\(^6\) See *id.* at 279.

\(^6\) See *id.* at 278.

\(^6\) Bryan v. Lofftus’s Administrators, 39 Am. Dec. 242, 1 Rob. 12 (referred to as *The Indian Chief*).

\(^6\) See *The Venus*, 12 U.S. (8 Cranch) 253, 280 (1814).

\(^6\) See *id.* at 287.

\(^6\) See *id.* at 288.

\(^6\) HASKINS & JOHNSON, *supra* note 14, at 442.

\(^6\) 12 U.S. (8 Cranch) 359 (1814).

\(^6\) *See id.*

\(^6\) 12 U.S. (8 Cranch) 444 (1814).

\(^6\) *See id.* at 446.
by assuring them that they could sail there without fear of capture.\textsuperscript{373} At the time, British troops on the Iberian peninsula were locked in a desperate struggle with Napoleon and the British were finding it difficult to keep them supplied.\textsuperscript{374} American ships bound for Portugal and Spain would, when stopped by British warships, be given licenses immunizing them from capture and allowed to proceed.\textsuperscript{375} The Hiram, owned by American merchants, sailed for Lisbon from Boston on September 24, 1812.\textsuperscript{376} She was captured on October 15 by the American privateer Thorn, brought into Massachusetts and libeled as enemy property.\textsuperscript{377} Following a prior decision by the Supreme Court in \textit{The Julia},\textsuperscript{378} Washington held that traveling under a license and passport of protection issued by the enemy would subject the ship and cargo to forfeiture as enemy property.\textsuperscript{379} Washington reaffirmed the rule of \textit{The Hiram} three years later in a short opinion for the Court.\textsuperscript{380}

Washington again looked to the “law of nations” for a rule of decision in \textit{The Big Alberta v. Moran}.\textsuperscript{381} The Alberta, owned by a Spanish subject residing in Cuba, was captured in 1810 by a French privateer who brought her to New Orleans.\textsuperscript{382} A libel filed in the U.S. District Court there by her owners contended that the captor ship, L'Epine, was not commissioned to capture Spanish ships and, even if she were so commissioned, had been armed in New Orleans and manned by American citizens contrary to the law of nations.\textsuperscript{383} Washington, with classic directness, asserted that the only issue was the jurisdiction of the district court.\textsuperscript{384} Trial of captors on the high seas, he said, belongs exclusively to the courts of the nation to which the captor belongs.\textsuperscript{385} But there are exceptions to this general rule.\textsuperscript{386} If a privateer has been illegally equipped or her armament augmented in a neutral port, the courts of the neutral nation possess the power and duty to restore

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  \item \textsuperscript{373} \textit{See id.} at 448.
  \item \textsuperscript{374} \textit{See id.}
  \item \textsuperscript{375} \textit{See id.} at 446.
  \item \textsuperscript{376} \textit{See id.} at 448.
  \item \textsuperscript{377} \textit{See The Hiram}, 12 U.S. (8 Cranch) at 448.
  \item \textsuperscript{378} 12 U.S. (8 Cranch) 181 (1814).
  \item \textsuperscript{379} \textit{See The Hiram}, 12 U.S. (8 Cranch) at 451.
  \item \textsuperscript{380} \textit{See The Ariadne}, 15 U.S. (2 Wheat.) 143 (1817).
  \item \textsuperscript{381} 13 U.S. (9 Cranch) 359 (1815).
  \item \textsuperscript{382} \textit{See id.} at 359.
  \item \textsuperscript{383} \textit{See id.}
  \item \textsuperscript{384} \textit{See id.} at 364.
  \item \textsuperscript{385} \textit{See id.}
  \item \textsuperscript{386} \textit{See The Brig Alberta}, 13 U.S. (9 Cranch) at 364.
\end{itemize}
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the prize to its owner. 387 "This is necessary to the vindication of their own neutrality." 388 Washington went on to deny the captors' claim to the salvage. 389 The prize had originally sailed for Belize, but had put into New Orleans. 390 The captors claimed the diversion to New Orleans was necessitated by a severe gale and want of provisions; the prize crew argued that, as a consequence, they had saved the ship and were entitled to salvage. 391 With laconic eloquence, Washington made short work of this argument:

This claim is entirely inadmissible. Salvage is allowed as a reward for the meritorious conduct of the salvor, and in consideration of a benefit conferred on a person whose property he has saved... Nothing could be more remote from the intentions of the captain of the privateer than to render a service to this ship and her cargo. 392

Armroyd v. Williams, 393 decided by Washington on circuit, represents an extreme example of the rule requiring acceptance of the decrees of foreign admiralty courts. An American vessel sailing from a British island in the West Indies for New London, Connecticut, was captured by a French privateer and taken to St. Martin's where she was held while condemnation proceedings were instituted against her in the French admiralty court at Guadeloupe. 394 The ground for her seizure was violation of Napoleon's 1807 Milan Decree which unilaterally declared that any ships submitting to British search or conforming to the requirements of the British orders-in-council would be subject to French seizure. 395 While at St. Martin's, and before the admiralty court at Guadeloupe had acted, the vessel was sold to a bona fide purchaser. 396 The admiralty court subsequently held the seizure valid on the ground that the ship had violated the Milan Decree. 397 The Milan Decree was itself, the parties admitted, a violation of the law of nations. 398 The owner of the vessel sued in the U.S. District Court for the District of Pennsylvania

387 See id.
388 Id.
389 See id. at 366.
390 See id. at 359.
391 See The Brig Alberta, 13 U.S. (9 Cranch) at 367.
392 Id.
393 11 U.S. (7 Cranch) 423 (1813).
394 See id.
395 See HASKINS & JOHNSON, supra note 14, at 542.
396 See Armroyd, 11 U.S. (7 Cranch) at 423.
397 See id.
398 See id.
to recover his property and, from a judgment in his favor, appeal was taken to the Circuit Court. Washington held that the decree of the French admiralty court was conclusive to divest the title of the original owners. The sale to the purchaser at St. Martin’s was therefore valid, and the owners had no right to return of the ship. This was true even though the French court had itself proceeded upon a ground repugnant to the “law of nations.” In 1813, the case came before the United States Supreme Court where the decision was affirmed in an opinion by the Chief Justice.

Justice Washington’s last reported maritime case was *The Seneca*. This case reaffirms the proposition that there is one maritime law for all nations. The owners of the Seneca had fallen out over who was to make repairs to the ship and who had the authority to appoint a master to take her to sea. The opposing camps were evenly split, each owning a one-half interest. One group of owners filed a petition for an order directing that the ship be sold. The district court found no authority to order a sale and dismissed the petition. Washington reversed, holding that the Judiciary Act of 1789 granted jurisdiction over all cases of a maritime nature whether they “be particularly of admiralty cognizance or not.” Searching the various maritime authorities, Washington conceded that a power of part-owners of a ship to force a sale normally did not exist. He reached far back in time to find an exception to the general rule in cases where the owners are evenly divided. The Marine Code of France, published in 1681, which he determined to be a part of the law of nations and applicable to the case, allowed such a sale in cases of evenly divided ownership. Accordingly, Washington ordered the Seneca sold.

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399 See id.
400 See HASKINS & JOHNSON, supra note 14, at 542.
401 See Armroyd v. Williams, 11 U.S. (7 Cranch) 423 (1813).
402 Id.
403 See id.
405 See id.
406 See id.
407 See id.
408 See id.
409 See *The Seneca*, 11 U.S. (7 Cranch) at 1081.
410 Id. at 1082.
411 See id.
412 See id. at 1083.
413 See id. at 1083-84.
414 See *The Seneca*, 11 U.S. (7 Cranch) at 1084.
The prize cases proceed upon the implicit proposition that there is one "law of nations" binding throughout the world.\textsuperscript{415} As such, the prize courts of every nation theoretically apply the same law and their decrees are to be given full faith and credit everywhere.\textsuperscript{416} Prize cases are actions in rem to which "all the world" are parties.\textsuperscript{417} The jurisdiction with possession of the ship tries the case and all claimants must press their claims in that one case or lose out. The quest for uniform rules and certainty of decisions is thus allowed to trump considerations of equity and fairness in individual cases. The benefits of such a doctrine to commerce, if it were to be consistently applied, are obvious. Merchants have one set of rules and get one opportunity in prize cases; they do not have to deal with inconsistent rules of law and decisions by competing courts. Once a prize court acts, the decision is final for all.

Closely related to the prize cases is the subject of marine insurance. Dozens of marine insurance cases came before Washington on circuit and he occasionally wrote for the Supreme Court in such cases. The marine insurance cases, like the prize cases, presented the issue of whether American courts would follow the developing law of nations or would create a uniquely American solution to the issues presented. Here, as in the prize cases, Washington was a force pushing the courts toward the international approach and the acceptance of precedent which was primarily British. Marine insurance dates to the late Middle Ages\textsuperscript{418} and was "in full use" in England by the reign of Elizabeth I.\textsuperscript{419} In Tudor England, marine insurance cases were assigned to the common law courts.\textsuperscript{420} Because of their "maritime flavor," however, the law in such cases was heavily influenced by the civil law and commercial customs and usages.\textsuperscript{421}

In England, marine insurance generally followed the "Lloyd's" pattern in which individual underwriters joined to share the risks of multiple voyages.\textsuperscript{422} In America, however, most marine underwriting was done through incorporated insurance companies.\textsuperscript{423} The Lloyd's system was designed primarily to share risks among merchants who often operated as both insurers and insureds.\textsuperscript{424} Rise of the corporate form effectively divided insurers and insureds into two camps, often with competing interests.\textsuperscript{425} Moreover, marine insurance contracts supplied "first party"

\textsuperscript{415} See Armroyd v. Williams, 1 F. Cas. 1132, 1133 (C.C.D. Pa. 1811).
\textsuperscript{416} See id.
\textsuperscript{417} Id.
\textsuperscript{418} See Grant Gilmore & Charles L. Black Jr., The Law of Admiralty 54 (2d ed. 1975).
\textsuperscript{419} Id.
\textsuperscript{420} See Haskins & Johnson, supra note 14, at 454.
\textsuperscript{421} Id.
\textsuperscript{422} See Gilmore & Black, supra note 418, at 55.
\textsuperscript{423} See Horwitz, supra note 7, at 227.
\textsuperscript{424} See id. at 227-28.
\textsuperscript{425} See id. at 228.
coverage only—the policies were designed to provide indemnification for personal
loss, not protection against liability to third parties.\footnote{426}

The development of insurance law in the Eighteenth Century is associated
with William Murray, First Earl of Mansfield,\footnote{427} who served as Chief Justice of the
Court of King’s Bench from 1756 until his death in 1793.\footnote{428} The fact that he was a
Scot, not English, and was a student of Roman and civil law,\footnote{429} may have made
Lord Mansfield’s opinions more readily acceptable in America where resentment
against English law lingered. Mansfield had a huge impact on American
commercial law in general and on marine insurance law in particular.

The general acceptance of the English practice in marine insurance was
confirmed in \textit{Croudson v. Leonard},\footnote{430} discussed above, which held the decree of a
foreign prize court to be conclusive on issues of neutrality raised under a policy of
insurance.\footnote{431} Justice Story’s opinion on circuit in \textit{Delovio v. Boit}\footnote{432} held that
marine insurance cases were within federal admiralty jurisdiction.\footnote{433} The decision
was popular with underwriters because they did not like juries.\footnote{434} The state courts
retained concurrent jurisdiction, however, and plaintiffs could still obtain jury trials
by suing in state court.\footnote{435} Nevertheless, numerous marine insurance cases came to
the federal courts as admiralty cases; at the same time, many marine insurance
cases were tried to juries in the federal circuit courts under diversity jurisdiction.\footnote{436}

Professor Fletcher calls marine insurance the best example of a general
common law subject jointly administered by state and federal courts.\footnote{437} “To an
unusual degree,” he says, “it fulfilled the twin aspirations of the age for the law
merchant: certainty and uniformity.”\footnote{438}

Washington’s contribution to the development of marine insurance law
was significant. His first opinion for the Supreme Court in a marine insurance case
was a seriatim opinion in \textit{Marine Insurance Co. of Alexandria v. Wilson}.\footnote{439} The

\footnotesize{\begin{itemize}
  \item \footnote{426} See \textit{id.} at 335, n.198.
  \item \footnote{427} See \textit{Horwitz, supra} note 7, at 227.
  \item \footnote{428} See \textit{Haskins & Johnson, supra} note 14, at 456 n.5.
  \item \footnote{429} See \textit{Friedman, supra} note 66, at 28.
  \item \footnote{430} \textit{Croudson v. Leonard}, 8 U.S. (4 Cranch) 434 (1808).
  \item \footnote{431} See \textit{Haskins & Johnson, supra} note 14, at 456.
  \item \footnote{432} 7 F. Cas. 418 (C.C.D. Mass. 1815).
  \item \footnote{433} \textit{See id.}
  \item \footnote{434} \textit{See Horwitz, supra} note 7, at 345-46 n.140.
  \item \footnote{435} \textit{See id.}
  \item \footnote{436} \textit{See id.}
  \item \footnote{437} \textit{See Fletcher, supra} note 305, at 1554.
  \item \footnote{438} \textit{Id.}
  \item \footnote{439} 7 U.S. (3 Cranch) 187 (1805).
\end{itemize}
policy in question stipulated that there was no obligation of the underwriters to pay if the vessel were condemned as unsound at the inception of the risk.\textsuperscript{440} The voyage began on October 24.\textsuperscript{441} A report of survey found the vessel unsound as of October 31.\textsuperscript{442} Washington's opinion held that because there was no evidence of unsoundness as of the 24th, the obligation to pay was not absolved.\textsuperscript{443} Professor Johnson sees this case as an uncharacteristic departure from English insurance law which created a rebuttable presumption that any unseaworthiness existed at the beginning of the voyage.\textsuperscript{444} As Johnson points out, however, the point was not raised in oral argument or the Court's deliberations.\textsuperscript{445}

Washington contributed a second seriatim opinion on the subject in Marine Insurance Co. of Alexandria v. Tucker,\textsuperscript{446} a case involving issues of deviation and non-inception of a voyage. The vessel in question had been insured for a trip from Kingston, Jamaica, to Alexandria, Virginia.\textsuperscript{447} After taking on its cargo, the ship determined to visit Baltimore first and then proceed to Alexandria.\textsuperscript{448} She was captured before reaching the "dividing point" of the voyage.\textsuperscript{449} Washington's opinion held that because the capture occurred before the dividing line between Baltimore and Alexandria, there was only an intended, not an actual, deviation and the policy was not avoided.\textsuperscript{450} In a scholarly opinion, Washington traced the English cases to the reign of George II and distinguished opinions by Lord Mansfield and Lord Kenyon.\textsuperscript{451} The opinion contains the following comment on the value of precedent:

The criticism of counsel for the plaintiffs in error, upon the rule contended for by the defendants, ought not, in my opinion, to avail them, if that rule be firmly established by uniform decisions: for in questions which respect the rights of property, it is better to adhere to principles once fixed, though, originally they might not have been perfectly free from all objection, than to unsettle the law, in order to render it more consistent with the dictates of sound

\textsuperscript{440} See id.
\textsuperscript{441} See id.
\textsuperscript{442} See id.
\textsuperscript{443} See id. at 192.
\textsuperscript{444} See HASKINS & JOHNSON, supra note 14, at 463-64 n.29.
\textsuperscript{445} See id.
\textsuperscript{446} 7 U.S. (3 Cranch) 357 (1806).
\textsuperscript{447} See id.
\textsuperscript{448} See id. at 366.
\textsuperscript{449} Id. at 368.
\textsuperscript{450} See id. at 390-91.
\textsuperscript{451} See Marine Insurance, 7 U.S. (3 Cranch) at 388-90.
reason.\textsuperscript{452}

The concept that it was more important for a rule to be settled than that it be settled correctly was a theme directly derived from Lord Mansfield.\textsuperscript{453}

On circuit, Washington probably decided more marine insurance cases than any other Supreme Court Justice.\textsuperscript{454} He sat in Philadelphia, one of the principal American seaports, and in Trenton, New Jersey, which embraced cases from the mid-Atlantic coastline. Geography, and the commercial activity associated with it, therefore combined to make Washington a maritime judge.\textsuperscript{455} Two cases decided by him on circuit in 1808 illustrate his decisional process in marine insurance matters and the influence he had on other courts in the field. \textit{Queen v. Union Insurance Co.},\textsuperscript{456} involved a policy on the ship Experiment. The Experiment was captured by a Spanish privateer while on a voyage in the West Indies and then recaptured about four hours later by a British warship.\textsuperscript{457} The insureds attempted to abandon the vessel, which would have allowed them to claim a total loss under the policy.\textsuperscript{458} Relying on three specific English cases, Washington set forth the rules governing the right to abandon in cases of capture and recapture, holding on the facts of the case there was no right to abandon.\textsuperscript{459}

In \textit{Odlin v. Insurance Co. of Pennsylvania},\textsuperscript{460} the insured vessel had sailed the day before the Embargo Act of 1807 was passed by Congress, but was detained by adverse winds in the Delaware River where her papers were seized by revenue officers for violation of the embargo. The plaintiff insured abandoned the vessel to his insurers and claimed a total loss under the policy.\textsuperscript{461} The insurer contended that the contract should be deemed terminated because the embargo had rendered its performance illegal.\textsuperscript{462} In a long opinion, Washington reviewed numerous continental and British authorities and held that an embargo does not render a contract unlawful, but only suspends its execution.\textsuperscript{463} Consequently, the insurer was still bound and the insured entitled to recover for a total loss.\textsuperscript{464} Among the

\textsuperscript{452} Id. at 388.
\textsuperscript{453} See Horwitz, supra note 7, at 190.
\textsuperscript{454} See Fletcher, note 305, at 1569.
\textsuperscript{455} Id.
\textsuperscript{456} 20 F. Cas. 131 (C.C.D. Pa. 1808).
\textsuperscript{457} See id.
\textsuperscript{458} See id.
\textsuperscript{459} See id.
\textsuperscript{460} 18 F. Cas. 583 (C.C.D. Pa. 1808).
\textsuperscript{461} See id.
\textsuperscript{462} See id.
\textsuperscript{463} See id.
\textsuperscript{464} See id. at 587.
authorities Washington considered were opinions by Lord Mansfield and Lord Kenyon as well as the works of Park and Marshall, the two leading scholars of the day on marine insurance.\textsuperscript{465} \textit{Odlin} was widely cited and praised by other judges as an able and thorough opinion.\textsuperscript{466}

The prize and marine insurance cases illustrate Washington's decisional process and his view of law. As James Wilson had apparently taught him, law is a system of immutable rules of right and wrong. Judges do not formulate the rules, they "discover" them. The process of discovery is wide-ranging with the judge free to consult all available sources as evidence of what the rules are. Except in matters of a strictly local nature, where rules of law peculiar to the particular locality may exist, the judge's job is to find a general rule of decision binding on everyone. General rules are especially important in the commercial context. Commercial activity transcends state and national boundaries. Commerce is a beneficial activity which is to be encouraged and facilitated. Uniform rules which transcend the state and national boundaries are therefore a benevolent way to encourage and facilitate the free flow of commerce.\textsuperscript{467}

C. Western Lands

American expansion, growth, and commercial activity centered not only on the sea, but also on the new lands in the West. Abundant, cheap land pulled the burgeoning population westward like a magnet. Here, competing systems of land tenure clashed as the courts struggled to develop rules to resolve legal issues presented. At the same time, commercial interests and rules of law governing business matters conflicted with more traditional rules governing title to real property. In cases involving title to western lands, Justice Washington often dealt with these issues.

Two systems of land development existed side by side in the original colonies.\textsuperscript{468} New England was settled by groups of people who lived together in towns and stressed cooperative effort.\textsuperscript{469} The other colonies were built on large land grants, with echoes of feudal land tenure, to politically prominent investors.\textsuperscript{470} The two systems represented conflicting political goals.\textsuperscript{471} Density of settlement, a goal of the cooperative system, provided protection and laid the foundation for economic growth.\textsuperscript{472} Large grants to absentee owners, on the other hand, were

\textsuperscript{465} See HASKINS \& JOHNSON, \textit{supra} note 14, at 455.
\textsuperscript{466} See Fletcher, \textit{supra} note 305, at 1573.
\textsuperscript{467} See WHITE, \textit{supra} note 15, at 76-156, for a comprehensive discussion of the nature and sources of law in Washington's era.
\textsuperscript{468} See HASKINS \& JOHNSON, \textit{supra} note 14, at 588.
\textsuperscript{469} See id.
\textsuperscript{470} Id. at 589.
\textsuperscript{471} See id. at 590.
\textsuperscript{472} See id.
designed to add revenues to the public treasury. Under the latter system, claims to land lying within the large grants became a commodity with warrants and patents trading as a medium of exchange in the economic marketplace.

Land speculation was common in the early republic. George Washington and John Marshall each acquired large western claims with no intention of settling there. Speculation in western lands destroyed the judicial career and reputation of James Wilson, who died in a North Carolina inn hiding from his creditors. Indefinite boundaries, ambiguous surveys, and "squatting" often produced conflicting claims. Actions of state governments exacerbated the problem. For example, inconsistent interpretations by two state administrations in Pennsylvania contributed to confusion surrounding claim by the Holland Land Company to 500,000 acres in the northwestern part of the state. Virginia issued three different types of warrants to its western lands in what later became the State of Kentucky. The warrants had competing political goals. Occupation warrants were designed to encourage settlement; military warrants paid off veterans for service in the Revolutionary and Indian wars; and treasury warrants raised public revenue. A claim under a warrant could be perfected into a patent or title only by a survey plat and a certificate of settlement. This system led to fraud, confusion, and a profusion of conflicting claims.

Justice Washington was no stranger to land litigation. His first opinion as a Supreme Court Justice, rendered seriatim in Fowler v. Lindsey, involved competing claims in the "Connecticut gore," a strip of land eight miles wide running the length of the New York-Pennsylvania border, claimed by Connecticut under her sea-to-sea charter. The case was decided on a jurisdictional issue.

The Holland Land Company controversy, another aspect of the "Pennsylvania Rebellion," came before Washington in several cases in the circuit court. In 1792, Pennsylvania passed a statute designed to facilitate development of potentially rich lands lying "north and west of the rivers Ohio and Allegheny,

473 See Haskins & Johnson, supra note 14, at 590.
474 See White, supra note 15, at 782.
475 See Page, supra note 93, at 385-91.
477 See id.
478 See White, supra note 15, at 756.
479 See id. at 759.
480 See id.
481 3 U.S. (3 Dall.) 411 (1799).
482 Goebel, supra note 70, at 789.
483 See id. at 790.
484 Haskins & Johnson, supra note 14, at 317.
and Conewango Creek.\textsuperscript{485} The statute had two objectives — to raise revenue for the state treasury, and to secure development of the lands as a western barrier to the Indian tribes.\textsuperscript{486} There were two methods of obtaining title to these lands.\textsuperscript{487} First, warrants could be purchased which would entitle the warrantees to patents if certain settlement requirements were subsequently met.\textsuperscript{488} Second, actual settlement would, if specific conditions were met, entitle the settler to a settlement warrant which could ripen into a patent or title.\textsuperscript{489} Not surprisingly, the first method appealed to entrepreneurs who could afford to buy warrants covering large tracts, while the second method was an invitation to individuals and families to develop smaller parcels.\textsuperscript{490} It is likewise not surprising that, in the charged political climate of the day, the former method appealed to Federalists, while the latter method was preferred by Republicans.\textsuperscript{491}

An Indian war raged on the Pennsylvania frontier from 1783 until the Treaty of Greenville in 1795.\textsuperscript{492} The Act for the Sale of the Vacant Lands, as the Pennsylvania statute was called, was passed while this war was in progress.\textsuperscript{493} The act required warrantees to begin settlement on each 400-acre tract within two years of obtaining their warrants, and to perfect title by continuous residence for five years thereafter.\textsuperscript{494} Those obtaining settlement warrants were obligated to fulfill the five-year continuous residence requirement.\textsuperscript{495} Because the legislature feared the Indian wars would frustrate development, they placed in the statute the notorious Section IX proviso which was to become the source of much difficulty.\textsuperscript{496} It read as follows:

\begin{quote}
Provided always nevertheless, That if any such actual settler, or any grantee in any such original or succeeding warrant, shall, by force of arms of the enemies of the United States, be prevented from making such actual settlement, or be driven therefrom, and shall persist in his endeavors to make such actual settlement as aforesaid, then, in either case, he and his heirs shall be entitled to
\end{quote}

\textsuperscript{485} Id. at 318.
\textsuperscript{486} See id. at 317.
\textsuperscript{487} See id.
\textsuperscript{488} See id.
\textsuperscript{489} See HASKINS & JOHNSON, supra note 14, at 317.
\textsuperscript{490} See id.
\textsuperscript{491} See id. at 317-19.
\textsuperscript{492} See id. 317-18.
\textsuperscript{493} See id. at 317.
\textsuperscript{494} See HASKINS & JOHNSON, supra note 14, at 317.
\textsuperscript{495} See id.
\textsuperscript{496} See id.
have and to hold the said lands, in the same manner as if the actual settlement had been made and continued.\(^{497}\)

In 1793, the Holland Land Company invested over $200,000, a huge sum in those days, and purchased warrants for nearly half a million acres.\(^{498}\) The company intended to develop the lands and meet the settlement requirements by moving tenants onto the individual tracts.\(^{499}\) The company apparently believed the settlement requirement to be postponed or excused by the Section IX proviso, for much of the land it acquired remained unsettled during the two-year period after it acquired its warrants.\(^{500}\) However,

rumours, raised and circulated by artful and interested men, and countenanced by the obscure and equivocal language of the law, were heard to insinuate, that the warrantees had incurred a forfeiture of their lands, by the lapse of two years from the dates of the warrants, notwithstanding the terms of the proviso.\(^{501}\)

Encouraged by such rumors, settlers poured into the Holland lands after the Treaty of Greenville, and many of the company’s tenants renounced their leases and determined to hold the lands in their own right.\(^{502}\) In many cases, tenants recruited by the company found the lands they were to develop occupied by “squatters” who drove them off by force of arms.\(^{503}\)

Crucial to the resolution of conflicting claims was the construction to be given the Section IX proviso.\(^{504}\) In general, there were three contending positions.\(^{505}\) The first was that, if the holder of a warrant was prevented by Indian hostilities from making a settlement within two years of issuance of the warrant, the settlement and residency requirements were totally excused and the holder could obtain a patent without further effort.\(^{506}\) Others argued that, although the conditions were not excused, all that was required was persistent efforts to make settlement and reside on the tract for five years; such persistent efforts entitled the settler to a patent even if the efforts were unsuccessful.\(^{507}\) Finally, it was contended

\(^{497}\) Id. at 318.

\(^{498}\) See id.

\(^{499}\) See HASKINS & JOHNSON, supra note 14, at 318.

\(^{500}\) See id.


\(^{502}\) See id.

\(^{503}\) Id. at 181-82.

\(^{504}\) See id. at 197.

\(^{505}\) See id. at 201.

\(^{506}\) See Coxe, 4 U.S. (4 Dall.) at 201.

\(^{507}\) See id.
that the proviso merely postponed the conditions and that title could be obtained only if cessation of hostilities were followed by settlement within two years and satisfaction of the five-year residency requirement thereafter.508

Adoption of the third alternative would have cost the Holland company over half of its land.509 Under the Federalist government, which held power in Pennsylvania prior to 1799, the interpretation that the proviso dispensed with the settlement requirement was adopted and the company was granted patents to much of its land.510 The ensuing outcry from settlers holding adversely to the Holland company and their bitter political backlash against the Federalist position were factors contributing to Republican victory in Pennsylvania in the 1799 elections.511 The new government changed its position and now held that the proviso merely postponed the settlement requirement.512 The Holland company responded by bringing a mandamus action to compel the state to deliver the remainder of its patents.513 In a split decision, the Supreme Court of Pennsylvania adhered to the third construction, and dismissed the suit.514 The legislature, unable to pass a bill directly resolving the controversy, ordered that a second suit, upon a trial with feigned issues, be held to decide the matter.515 The Holland Land Company refused to participate in the trial.516 Nevertheless, the result was inconclusive and added to the confusion. The Court adopted the Republican position that the proviso merely postponed the settlement requirement, but held also that each case must turn on its own peculiar facts as to whether the settlement requirement had been met.517 Thus, each individual title dispute became a jury question.

Frustrated in its efforts to obtain relief from the legislature or through the courts of Pennsylvania, the Holland Land Company turned to the federal circuit court in Philadelphia. Here, no doubt, they expected to encounter a sympathetic ear from Federalists Washington and Peters. Curiously, the first case to come before the circuit court involving title to lands covered by the 1792 act was not a Holland company case. Balfour’s Lessee v. Meade518 involved conflicting claims, both of which were based on settlement rights. Nevertheless, the parties fairly represented

508 See id. at 203.
509 See HASKINS & JOHNSON, supra note 14, at 318.
510 See id.
511 See id. at 318-19.
512 Id. at 319.
513 See id.
516 See id. at 238 n.1.
517 See id. at 242.
518 4 U.S. (4 Dall.) 363, 2 F. Cas. 543 (1803).
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the Federalist and Republican positions.\textsuperscript{519} Balfour was an army surgeon stationed in 1793 at Fort Franklin in western Pennsylvania.\textsuperscript{520} He attempted to obtain settlement rights to five tracts intending to lodge tenants there.\textsuperscript{521} During six or seven days in 1793 Balfour, with some soldiers, built crude, incomplete cabins on the tracts; later, Balfour had the tracts surveyed and obtained settlement warrants for two of them.\textsuperscript{522} In 1794, Meade, finding the tracts unoccupied, built cabins there and, a year later, moved in with his family.\textsuperscript{523} Balfour sued through his lessee to eject Meade, claiming that the Indian wars had prevented him from completing the residence requirement.\textsuperscript{524}

In a straightforward opinion, Washington first concluded that Balfour’s activities fell short of actual settlement as contemplated by the statute.\textsuperscript{525} He then turned to the issue of whether Balfour came within the proviso excusing the settlement requirement in the case of Indian hostilities.\textsuperscript{526} Washington reasoned that without an “incipient title . . . created by actual settlement”\textsuperscript{527} Balfour could not take advantage of the proviso.\textsuperscript{528} To obtain an incipient title, he reasoned, one had to make sufficient efforts at settlement to evince a bona fide intention to reside on the land.\textsuperscript{529} Washington distinguished the two state cases, which he described as “the Holland Company v. Coxe, and the feigned issue tried at Sunbury,”\textsuperscript{530} on the ground that they involved warrants authorized by the act, while the source of the incipient title in Balfour was settlement.\textsuperscript{531}

The Holland Land Company must have found little comfort in Washington’s Balfour opinion. His reasoning was based entirely on construction of the specific words of the 1792 Pennsylvania statute.\textsuperscript{532} He had effectively sided with the small family farmer who had “squatted” on Balfour’s claim, and against an aspirant landlord who planned to move tenants onto the land.\textsuperscript{533} Washington’s

\begin{enumerate}
\item See id.
\item See id.
\item See id.
\item See id.
\item See Balfour’s Lessee, 4 U.S. (4 Dall.) at 363.
\item See id.
\item See id.
\item See id.
\item Id. at 368.
\item See Balfour’s Lessee, 4 U.S. (4 Dall.) 363, 368 (1803).
\item See id.
\item Id.
\item See id.
\item See id.
\item See Balfour’s Lessee, 4 U.S. (4 Dall.) at 368.
\end{enumerate}
family and circle of close associates included many who speculated in western lands intending to become large absentee landlords. His Federalist principles were consistent with the concept of land development as a commercial venture. If he brought any prejudices derived from this background to Balfour, however, he was able to set them aside and decide the case narrowly, relying on the specific words of the statute.534

In 1804, the Holland Land company, suing through its land agent, Harm Jan Huidekoper, filed several ejectment actions in the United States Circuit Court for the District of Pennsylvania. One of these, Huidekoper v. Stiles,535 was dismissed on a pleading point. In two others, Huidekoper v. Burrus,536 and Huidekoper v. McClean,537 Washington, certainly to the chagrin of the plaintiff, adopted the third interpretation of the Section IX proviso. The object of the 1792 act, he reasoned, was population and improvement of the country.538 What mattered was settlement and improvement, not endeavors to do so. The statutory purpose would be frustrated if settlement and improvement were not pursued to completion.539 In McLean, he summarized his conclusion as follows:

The only way therefore to make sense of the law, and to comply with the manifest intention of the legislature, is to construe the proviso as requiring the party to do that, after the impediments had ceased, which he must have performed had they never existed. He must persist until his endeavors are crowned with success. Instead of being obliged, at the risk of his life, to improve within two years from the date of his warrant, and to reside for five, it is enough, under the proviso, if he does the same things after the prevention had ceased.540

Washington had adopted what was essentially the Republican position. This was too much for Judge Peters. A fourth case, Huidekoper's Lessee v. Douglass,541 carried the issue to the Supreme Court of the United States upon a certificate of division between Washington and Peters. The report of the case on remand after the Supreme Court had ruled states that Washington "had delivered a charge to the jury, coinciding, generally, with the construction given by the supreme court of Pennsylvania, to the act of April, 1792, from which Judge Peters

534 See id.
535 12 F. Cas. 850 (C.C.D. Pa. 1804).
536 See 12 F. Cas. 840 (C.C.D. Pa. 1804) (No. 6848).
537 See 12 F. Cas. 848 (C.C.D. Pa. 1804) (No. 6852).
538 See id.
539 See Burrus, 12 F. Cas. at 842.
540 McLean, 12 F. Cas. at 850.
541 7 U.S. (3 Cranch) 1 (1805).
dissent.” When the case came before the Supreme Court, Chief Justice Marshall wrote for the Court and, relying on close construction of the words of the statute, held that persistent efforts to make settlement within two years of receipt of a warrant excused the settlement and residence requirements altogether. Marshall directly rejected Washington’s argument that the purpose of the statute would be frustrated if actual settlement and residence were not completed. Settlement of the country, he said, was not for the exclusive purpose of the statute; raising money for the treasury was also an objective. It is implicit in Marshall’s opinion that those who have paid money into the treasury for their warrants should be given every indulgence in perfecting their titles, otherwise there would be a disincentive to invest and the objective of raising revenue for the state would be frustrated.

Having thus disposed of the issue by construction of the statute, Marshall, in dicta, chastised the Pennsylvania legislature for changing the rules after the initial warrants were issued to the Holland Land Company. In doing so he interjected overtones of the contract clause, an issue which had not been previously raised in any of the cases. Marshall said:

This is a contract, and although a state is a party, it ought to be construed according to those well established principles which regulate contracts generally. The state is in the situation of a person, who holds forth to the world the conditions, on which he is willing to sell his property. If he should couch his propositions in such ambiguous terms that they might be understood differently: in consequences of which sales were to be made, and the purchase money paid, he would come with an ill grace into court to insist on a latent and obscure meaning, which should give him back his property, and permit him to retain the purchase money. All those principles of equity and fair dealing, which constitute the basis of judicial proceedings, require that courts should lean against such a construction.

In Marshall’s dictum, Huidekoper’s Lessee v. Douglass is a forerunner of the great contract clause cases which were to come a few years later.

When the case came back to the Circuit Court, Washington dutifully instructed the jury:

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543 See id. at 399.
544 See id. at 397.
545 See id. at 398.
546 See id.
547 See Douglass, 7 U.S. (3 Cranch) at 1.
548 Id. at 70.
549 HASKINS & JOHNSON, supra note 14, at 593-94.
[A warrantee who] was prevented, by the enemies of the United States, from making such settlement as the law required, but who, during that period, persisted in his endeavors to make such settlement, is entitled to hold his land in fee simple, although, after the prevention ceased, he made no attempt to make such settlement. This we must consider the law of the land, and govern our decision by it.\(^{550}\)

The Holland Land Company seemed to have won, but its victory was a nebulous one. The state courts continued to apply their own interpretation of the law as set forth in Commonwealth v. Coxe and Attorney General v. The Grantees.\(^{551}\) Another collision with the federal authority did not occur, however, because the state courts usually found for the company upon the facts of the particular cases.\(^{552}\) As in the Olmstead affair, the state remained defiant on the surface, but avoided further direct conflict with federal power. In sharp contrast to his position in the Olmstead matter, Washington had come down on Pennsylvania's side in the Holland lands controversy. When his positions in three "Pennsylvania Rebellion" controversies are compared — United States v. Bright, United States v. Fisher, and the Huidekoper's Lessee cases — Washington emerges as a justice committed to the rule of law who was capable of setting aside politics and his own predispositions in order to apply what he perceived to be controlling legal principles. In Fisher and in Huidekoper he was reversed by the Supreme Court, and in Bright the impact of his ruling was minimized by President Madison's pardon of the offenders. Nevertheless, in the three cases Washington emerges as a justice of principle and courage, above politics and the passions of the moment.

The chaotic state of land titles in western Pennsylvania represented by the Holland Land Company cases was repeated on a larger scale in Kentucky and Ohio. Warrants were freely assigned and sold. It was not uncommon for purchasers who had developed their property to be confronted, sometimes years after the original warrants had issued, with adverse claims made by descendants of the original warrantees. A number of these cases reached the Supreme Court in the 1820's and Washington frequently authored the Court's opinions.

Hugh Stevenson was a colonel in the Virginia line during the Revolutionary War who died in the service of his country.\(^{553}\) His rank entitled his representatives to a warrant for 6,666 & 2/3 acres of land in that portion of Ohio reserved by Virginia for payment of its veterans. Colonel Stevenson had two illegitimate children by Ann Whaley whom he later married. A third son, Richard Stevenson, born to the couple after their marriage, died before reaching his majority. Before his death, however, Richard received a warrant to Ohio military lands as payment for his father's services. The warrant passed on Richard's death

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550 Douglass, 4 U.S. (4 Dall.) at 400.
551 See HASKINS & JOHNSON, supra note 14, at 322.
552 See id.
to his uncle, John Stevenson, Richard's heir under Virginia law. John Stevenson sold or assigned the warrant which became the basis for a claim of ownership by one Sullivant. Years later, Sullivant was sued by Colonel Stevenson's two illegitimate children. The two children claimed the warrants should have been issued to them under Colonel Stevenson's will which divided his estate equally between them and their mother.554

In a short opinion by Washington,555 the Supreme Court held for the defendant and dismissed the claim of the two children. The opinion first evaded the question of whether Ohio or Virginia law was to control.556 Because the parties acknowledged that Virginia law was more favorable to the plaintiffs, Washington reasoned, he had to analyze their case under that law.557 He then concluded that the plaintiffs were not within the term "representatives" of their father as that term was used in the Virginia statute providing for military warrants; that the plaintiffs were not made legitimate under Virginia law by the subsequent marriage of their parents and their father's acknowledgment of them; and that, as illegitimate children, they could not inherit from their brother.558

The case turned entirely on Washington's analysis of Virginia law. There is no mention of the significant issues of public policy bubbling beneath the surface, such as the conflict between the goals of certainty in land titles and the facilitation of commerce by allowing warrants to circulate as commercial paper.559 The effect of the decision, however, was to come down solidly on the side of certainty of titles. As he had done in the Holland land cases, Washington rendered a decision which tended to favor owners in possession — the persons who had expended their wealth and energy in developing the property.560

The situation in Kentucky had become so chaotic that the state legislature twice took action to protect its citizens who, after development of their lands, were evicted from holding superior titles. The first statute, passed in 1797, absolved evicted claimants from liability for rents and profits attributable to the periods during which they occupied the properties.561 The second, in 1812, required non-occupying superior claimants to compensate occupants for their possession, including any improvements made.562 Both statutes were in direct conflict with the common law which, not only made the evictee liable for rents and profits, but decreed that any improvements made would become the property of the evicting

554 See id. at 209.
555 See id.
556 See id. at 210.
557 See id.
558 See id. at 223.
559 See id. at 207.
560 See Sullivant, 18 U.S. (5 Wheat) at 207.
561 See WHITE, supra note 15, at 642.
562 Id.
owner. The Kentucky statutes directly contradicted a proviso in the 1789 compact between Kentucky and Virginia which permitted Kentucky to become a state.\textsuperscript{563} The compact specified that all private rights and interests in land in the new state would remain valid and be determined by then existing Virginia law.

The Kentucky statutes were tested in \textit{Green v. Biddle},\textsuperscript{564} which reached the Supreme Court in 1821. In a short opinion by Justice Story, the Court found for Green, the absentee owner, holding the Kentucky statutes to be in violation of the compact between the two states and “consequently unconstitutional.”\textsuperscript{565} Story’s opinion is uncharacteristically short and vague. “[B]y the general principles of law, and from the necessity of the case,” said Story, “titles to real estate can be determined only by the laws of the state under which they are acquired.”\textsuperscript{566}

The decision produced a storm of controversy. Responding to this case and \textit{Cohens v. Virginia},\textsuperscript{567} decided the same term, Kentucky Senator Richard Mentor Johnson, later Vice President of the United States, led a vitriolic attack on the federal judiciary.\textsuperscript{568} Henry Clay, recently Speaker of the House of Representatives and Kentucky’s leading lawyer, moved for a rehearing on the ground that Biddle had not been represented at the first hearing and because the case “involved the rights and claims of numerous occupants of land in Kentucky.”\textsuperscript{569} Clay was well familiar with the problem. He had served unsuccessfully as one of two commissioners appointed by Kentucky to travel to Richmond and try to reach a compromise with the Virginia legislature.\textsuperscript{570} The motion for rehearing was granted and the case was reargued for an entire week in March, 1822.\textsuperscript{571} The Supreme Court waited almost a year before handing down its new decision, perhaps hoping the furor would abate.

This time Washington spoke for the Court. He wrote with characteristic directness posing two questions: Are the rights and interests in Kentucky lands as secure under the 1797 and 1812 acts as they were under the laws of Virginia at the time of Kentucky’s separation?\textsuperscript{572} If not, are those statutes unconstitutional?\textsuperscript{573} There followed a long opinion drawing on a wide array of authorities. Perhaps Washington hoped to convince the country there could be no doubt about the way

\textsuperscript{563}21 U.S. (8 Wheat.) 1 (1823).
\textsuperscript{564}See id. at 13.
\textsuperscript{565}Id.
\textsuperscript{566}Id. at 11-12.
\textsuperscript{567}19 U.S. (6 Wheat.) 264 (1821). In \textit{Cohens}, the Supreme Court held a state criminal statute unconstitutional.
\textsuperscript{568}4 BEVERIDGE, supra note 218, at 376.
\textsuperscript{569}Green v. Biddle, 21 U.S. (8 Wheat.) 1, 18 (1823).
\textsuperscript{571}See 4 BEVERIDGE, supra note 218, at 380.
\textsuperscript{572}See Green, supra note 218 at 1.
\textsuperscript{573}See id. at 3.
the case should come out. He reviewed the English common law of property and Virginia law at the time of Kentucky’s separation and concluded that “the successful claimant of land in Virginia, who recovers in ejectment, was at all times entitled to recover rents and profits in an action of trespass...” He then found no principle of equity exempting application of the legal principle. Normally, Washington would have stopped at this point, satisfied with a short, direct opinion, supported by controlling authority. But in Green v. Biddle he pressed on. He looked at doctrines of the civil law, citing authorities such as Puffendorf. His objective was to show that the civil law was consistent with the principles of common law and equity on which he relied. It “can hardly be asserted.” He then declared, answering the first question posed, that the rights of owners were as secure under Kentucky law as they had been under the laws of Virginia. Finally, he turned to the contract clause and found it offended by the Kentucky statutes. Impairment of the obligation of a contract, he concluded, “can never depend upon the extent of the change which the law effects in it. Any deviation from its terms...impairs its obligation.” He had no difficulty finding the interstate compact in question to be a contract; a contract is simply any agreement between two or more parties.

Washington acknowledged that “a great diversity of opinion prevails in [Kentucky] upon the question we have been examining.” He then concluded:

However this may be, we hold ourselves answerable to God, our consciences and our country, to decide this question according to the dictates of our best judgment, be the consequences of our decision what they may.

It has been suggested that Green v. Biddle, at least on its surface, is “a curious, almost reckless decision” and so it seems. The Court could have avoided the public outcry and found for Kentucky on the simple ground that the interstate compact in question had not been approved by the federal government as required by the Constitution. Washington found there to be an implicit approval, however, in federal legislation admitting Kentucky to the union as a new state. Or,

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574 Id. at 77.
575 See id.
576 See id.
577 Biddle, 21 U.S. (8 Wheat.) at 84.
578 See id.
579 Id.
580 Id. at 93.
581 Id. at 93.
582 WHITE, supra note 15, at 646.
583 See Green, 21 U.S. (8 Wheat.) at 1.
as Professor White suggests, the Court could have used the compact clause to divert some of the public criticism toward Congress. Under this line of reasoning the Kentucky statute would be deemed to be "trumped" by the compact under the federal supremacy clause of Article VI. Congress could therefore be blamed for upsetting Kentucky's property laws because it had approved the compact. This would have diverted criticism away from the Supreme Court.  

In choosing to ground its decision on the contract clause, the Court struck a blow for vested property rights. Title to property is to be determined by the law of the state where the property is located, as the Court was to hold in several cases, but once title is determined, the state should not tinker with rights traditionally associated with ownership.

One year after the decision in Green v. Biddle, Washington again wrote for the Court in a western lands case. In Kerr v. Devisees of Moon, the Court directly confronted the issue of whether land warrants were commercial paper. Archibald Moon was one of the hundreds of Revolutionary War veterans paid for their services by an allotment of western land. Moon claimed 4,000 acres in the Virginia military district of Ohio. This district had been reserved by Virginia for payment of her veterans when her western lands were relinquished to the federal government. Moon had two families, four children by a first wife, and six by a second. Moon died in 1796 and, by a will probated in Kentucky, he left his military land to his second wife and her children, disinheriting his first family. In 1809, two of Moon's children by his first wife assigned his military claim to Robert Price, who sold it to Kerr. Moon's children by his second wife sued in equity in federal court in Ohio, seeking an order compelling Kerr to assign the warrants he had bought from Price back to them. The determinative issue in the case was the character of the warrants as real or personal property. If Realty, Ohio law would control, and Moon's will, never probated in Ohio, could not operate to determine title to property there. If personalty, title to the warrants would be determined.

564  See White, supra note 15, at 646.
565  See id.
566  22 U.S. (9 Wheat.) 565 (1824).
567  White, supra note 15, at 775.
568  See Moon, 22 U.S. (9 Wheat) at 566.
569  See id. at 566.
570  See id. at 566-67.
571  See id. at 567.
572  See id.
573  See Moon, 22 U.S. (9 Wheat) at 567.
574  See id. at 565.
575  See id. at 571.
under the laws of Kentucky, the state of Moon’s domicile at his death. In a short opinion, Washington declined to accord the distinction any significance. Even if personalty, he reasoned, the warrants relate to real estate in Ohio. The matters must therefore be resolved under the laws of the place where the land is located. The practical effect of the decision was to lend certainty to the titles of those in possession of Ohio lands by making it more difficult for absentee claimants to establish their titles.

McCormick v. Sullivant, decided a year after Devisees of Moon, reaffirmed the rule that title to land can pass only by the laws of the state where the lands are located. William Crawford had been a colonel in the continental army and, as such, was entitled to a warrant to 6,666 & 2/3 acres of land between the Scioto and Little Miami rivers in Ohio. His will, probated in Pennsylvania, left his estate in equal parts to his son, John Crawford, and his two daughters, the plaintiffs. The warrant was issued, subsequent to William Crawford’s death, to his son John from whom the defendants derived their title. Relying upon United States v. Crosby, and Devisees of Moon, Washington’s opinion held that probate of the will in Pennsylvania was insufficient to pass title to lands in Ohio.

With the exception of Green v. Biddle, Washington’s western lands opinions disclose a preference for local law and generally favor those in possession over absentee claimants. This preference for possessors is explained in Holtzapple v. Phillibau, which involved competing claims to land in Cumberland County, Pennsylvania. Washington pointed out that a warrant or license which has not been perfected by a patent, or full payment of the purchase money, is merely an equitable, and not a legal, title. A junior claim, he held, followed up by due diligence, will take precedence over an older equitable title “inasmuch as the equity on which it is founded would be superior to that of the elder title.”

In land disputes, as in other types of cases, Washington pursued clear rules and predictable results. Because land law varied from jurisdiction to jurisdiction, this goal could only be achieved through the application of local law. A general common law of property applied by the federal courts would have merely added to the confusion. Additionally, Washington clearly believed the equities in close cases to lie with those in possession who had invested their wealth and labor in

596 See White, supra note 15, at 776.
597 See Moon, 22 U.S. (9 Wheat) at 571.
599 See id.
600 See id.
601 11 U.S. (7 Cranch) 115 (1812).
602 12 F. Cas. 430 (C.C.D. Pa. 1823).
603 See id.
604 Id. at 436.
605 See White, supra note 15, at 778.
developing the land. *Green v. Biddle* is not inconsistent with this pattern, for the case goes beyond the simple issue of who owns the property and presents an additional question: If ownership is determined to lie with the absentee claimant, to what extent may a state alter established concepts of what ownership entails? On this issue, Washington in *Green* falls back on traditional Federalist notions of the sanctity of private property. With the example of the French Revolution before them, Federalists feared mob rule and saw in the institution of private property a fortress of protection against the excesses of popular government. The contract clause was viewed as “a bulwark in favor of personal security and private rights.”606 *Green v. Biddle* is therefore at bottom an opinion designed to protect vested property rights from usurpation by a state legislature.607 As such, it is not inconsistent with Washington’s other western lands decisions.

D. **Slavery and Federal Crimes**

Washington’s circuit court cases on slavery and federal criminal law reveal his humanity and basic decency more than any of his other cases. But, despite the sympathy for slaves expressed in his opinions and his enduring support for eventual emancipation, it was an incident involving his own slaves which cast the only blot on his character.

When George Washington died in 1799, he left a life estate in Mount Vernon to his wife with a remainder over to his nephew, Bushrod Washington.608 The devise to Bushrod was a source of discord in the Washington family. President Washington’s brother, Lawrence, who had cared for Mount Vernon during the Revolutionary War, expected to inherit the property himself and his disappointment created a serious breach with his nephew.609 Martha Washington may have tried to remedy the problem by making specific bequests to other family members.610 Although Bushrod had managed her affairs during her widowhood, her will left all her personal property, including the furnishings and supplies of Mount Vernon, to others.611 Thus, Bushrod inherited a huge house, in need of repairs, and four thousand acres of property, without furniture, farm implements, or supplies.612 To live at Mount Vernon and work the plantation, he borrowed nearly four thousand dollars.613 Additionally, in compliance with a directive in George Washington’s

606 *The Federalist No. 44*, at 291 (James Madison) (Modern Library ed. 1937).
607 *See* White, *supra* note 15, at 646.
608 *See* Annis, *supra* note 2, at 102.
609 *See* id.
610 *See* id.
611 *See* id. at 102.
612 *See* id.
613 *See* id.
will, Bushrod freed the Mount Vernon slaves on Martha Washington's death. \(^{614}\) He moved his own slaves onto the plantation, but these must have been far fewer in number than those freed under his uncle's will. \(^{615}\)

Bushrod Washington never recovered financially from the burden of Mount Vernon, yet he remained determined to hold the plantation at all costs. From 1802 to 1822, he operated Mount Vernon at annual losses between five hundred and one thousand dollars. \(^{616}\) His salary as a federal judge was $3,500 a year until 1819 when it was raised to $4,500. \(^{617}\) He was required to extend the original loan enabling him to operate Mount Vernon. \(^{618}\) At the same time, Washington’s family obligations were significant. His wife, Ann Blackburn, to whom he was devoted, was a semi-invalid, sensitive, and insecure; she required his continual care and attention. \(^{619}\) Bushrod and Ann Washington had no children of their own, but when Bushrod’s brother Corbin died a widower, Bushrod and Ann took in his three sons and raised them as their own. \(^{620}\)

President Washington, in addition to the Mount Vernon house and lands, left his personal papers to his nephew. \(^{621}\) Bushrod felt a responsibility to use these papers in preparation of a biography of his famous uncle. \(^{622}\) He also saw a chance in this project to relieve his financial burdens. \(^{623}\) He recruited John Marshall to write the biography and the two agreed to split the profits. \(^{624}\) From the beginning the project was a disaster. \(^{625}\) Washington and Marshall made extravagant predictions of expected sales and were wildly optimistic as to when the manuscript would be ready. \(^{626}\) When Marshall finally completed the first volume, it had practically nothing to do with George Washington’s life; instead, it was a long

\(^{614}\) Cushman, supra note 1, at 53; Binney, supra note 20, at 25.

\(^{615}\) Professors Blaustein and Mersky assert that Justice Washington ignored the instructions in George Washington’s will to free the latter’s slaves on the death of Martha Washington. This is almost certainly incorrect. It would have been totally out of character for Justice Washington to ignore his uncle’s instructions, as well as a breach of his fiduciary duty as executor of the estate. See Blaustein & Mersky, supra note 285, at 255-56.

\(^{616}\) See ANNIS, supra note 2, at 103-04.

\(^{617}\) See id. at 104.

\(^{618}\) See id. at 103.

\(^{619}\) See Washington, supra note 67, at 330.

\(^{620}\) See ANNIS, supra note 2, at 82. Blaustein and Mersky erroneously refer to one of Bushrod’s nephews, Bushrod Corbin Washington, as Bushrod’s son. Blaustein & Mersky, supra note 285, at 247.

\(^{621}\) See ANNIS, supra note 2, at 104.

\(^{622}\) See id.

\(^{623}\) See id. at 106.

\(^{624}\) See id.

\(^{625}\) See id. at 106-07.

\(^{626}\) See 3 BEVERIDGE, supra note 208, at 224.
“introduction” tracing the entire history of the American colonies. The publisher lost money due to the length and prolixity of the volumes, and subscribers, weary of the long delays in publication, withdrew their support. The project totally failed to relieve the financial pressures upon them, as both Washington and Marshall had hoped.

In order to pay his debts, Washington sold off parts of the Mount Vernon estate and, in 1821, he sold some of the Mount Vernon slaves. Washington’s insensitivity to the plight of his slaves is the only thing raising any question about his character. His actions were inconsistent with his previous attitude toward slavery and his judicial decisions involving slaves. He appears to have been driven to the decision by his financial difficulties and the slaves’ rebellious conduct stemming from their belief that he would eventually emancipate them.

Like many Southern landowners, Bushrod Washington saw slavery as a moral evil even while owning slaves. He was active in the hopeless, but popular movement to send the slaves back to Africa. Washington endorsed the African colonization movement and served as the first president of the American Colonization Society. His opinions evince sympathy for the plight of American slaves and a propensity to construe the legal rules in favor of freedom.

In Pierce v. Turner, Washington held for the Supreme Court that a marriage settlement, conveying the wife’s land and slaves to trustees, by a deed to which her husband was a party, protects the property from the husband’s creditors. The slaves were thereby allowed to remain in the company of their mistress of many years instead of being sold to satisfy the debts of her deceased husband. Butler v. Hopper, a premonition of Dred Scott, surely aroused much public interest when it came on for trial before the circuit court in Philadelphia. The plaintiff, Pierce Butler, was a member of Congress from South Carolina where he owned a large plantation. From 1794, to the time of the suit, he kept a dwelling in Philadelphia where he lived continuously except for an annual visit to his southern plantations. Butler kept Ben, a domestic servant, with him in

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627 Id. at 242.
628 See id. at 235.
629 See ANNIS, supra note 2, at 104.
630 See id. at 198.
633 9 U.S. (5 Cranch) 154 (1806).
634 See id.
635 4 F. Cas. 904 (C.C.D. Pa. 1806).
636 See id.
637 See id.

https://researchrepository.wvu.edu/wvlr/vol102/iss4/4
Philadelphia and took Ben to South Carolina on his annual visits. φ With the exception of two years between 1796 and 1800, when he served in the South Carolina legislature, Butler was continuously a member of Congress until 1805. φ In 1805, the Pennsylvania Court of Common Pleas issued a writ of habeas corpus discharging Ben from Butler's service on the ground that under Pennsylvania law he had been emancipated by residence in a free state. φ Butler attacked the state court decision on two grounds. He first argued that, as a mere sojourner in Pennsylvania, he came within an exception to the statute under which Ben claimed his freedom; next, he claimed—benefit of a statutory exemption applying to members of Congress. φ Washington's jury charge was, in effect, a directed verdict for the defendant. φ There is ample evidence, he said, from which the jury may conclude Butler had acquired a new domicile in Pennsylvania and was therefore not a sojourner. φ Additionally, Washington continued, because during two of the years he resided in Philadelphia he was not a member of Congress, Butler had lost his congressional immunity. φ Ben was allowed to remain free.

Years later, in Ex parte Simmons, φ Washington refused a certificate under the Fugitive Slave Act to the owner of a runaway slave who brought him to Philadelphia from Charleston, South Carolina, and kept him there for ten months. Under the 1780 Pennsylvania statute providing for the gradual emancipation of slaves, Washington held, the exception for sojourners did not apply to one who kept a slave in the state over six months.

Washington v. Preston φ involved a resourceful slave named Tom who, after running away, was captured by his owner's agent and delivered to a jailer for safekeeping. The captor had obtained a certificate under the Fugitive Slave Act that Tom was a fugitive. Placed in the courtyard of the jail with other prisoners to await his supper, Tom escaped anew by going over the wall. Tom's owner sued the jailer for damages on the theory that the jailer had breached a bailment. Washington instructed the jury there was no bailment in the absence of a promise to pay the jailer a reward for safekeeping. φ The jury returned a verdict for the defendant.

φ See id.
φ See id.
φ See Butler, 4 F. Cas. at 904.
φ See id.
φ See id.
φ See id.
φ See id.
φ 22 F. Cas. 151 (C.C.D. Pa. 1823).
φ See id.
φ 30 F. Cas. 645 (C.C.D. Pa. 1824).
φ See id.
φ See id.
Like the cases on slavery, Washington’s opinions in criminal cases reveal his concept of a judge’s role and his judicial temperament. He held the government to high standards in criminal cases. In United States v. Morrow, the defendant in a counterfeiting case was acquitted after Washington charged the jury that a counterfeited half dollar must sufficiently resemble a real one to deceive a person of ordinary intelligence. “[T]he coin in question was “a miserable imitation of the genuine half dollar.” In another case, one Craig was found in possession of notes of the Bank of United States, some counterfeit and some genuine. The genuine notes were probably used as patterns for the bogus ones. Government agents seized all of the notes. After his conviction on a charge of counterfeiting, Craig sued to compel the government to return to him the genuine notes. Washington agreed and ordered the notes returned to Craig to enable him to pay for his defense on the counterfeiting charge.

United States v. Hand resulted from an unfortunate intersection of cultural misunderstanding, alcohol, and firearms. The Russian charge d’affaires in Philadelphia held a large party at his house to celebrate the coronation of the Emperor of Russia. In an effort to symbolize and salute the friendship between his government and the United States he displayed at one of his second story windows a painting showing a ship under an American flag entering a Russian port over which was placed a crown. A rabble gathered in the street, insulted that the Russian crown was placed above the American flag, and began to throw bricks and rocks at the house. Hand, who lived nearby and was intoxicated, went home and shortly returned with two large pistols which he discharged at the second story windows of the charge d’affaires’ house. Hand was indicted for assaulting a foreign officer and offering violence to the person of a foreign minister, but claimed he did not know it was the Russian minister’s house. Washington, in his charge to the jury, condemned Hand’s conduct as an outrage which deserved to be punished, but said the jury must acquit him of the crimes charged unless they determined he knew the house was that of the Russian minister. The jury found Hand not guilty.

The cases on slavery and crimes reflect Washington’s personality and judicial temperament. A patrician by birth and training, he did not lose sympathy for the misfortunate and those in distress.

V. CONCLUSION

Justice Washington’s reputation, secure in his own day, has suffered with the passage of time. He is often represented as lacking in perceptiveness and

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650 26 F. Cas. 1352 (C.C.D. Pa. 1827).
651 Id.
653 See Ex parte Craig, 6 F. Cas. 710 (C.C.D. Pa. 1827).
654 26 F. Cas. 103 (C.C.D. Pa. 1810).
655 See id.
dominated intellectually by Marshall and Story.\(^{656}\) Such assessments may spring from an unfortunate choice of words by Joseph Story. In a eulogy, Story described Washington’s mind as “slow, but not torpid.”\(^{657}\) When considered in context with Story’s other descriptive comments, it is probable he meant by this that Washington was slow in the sense of being careful and taking time to form an opinion. For Story also says Washington was “sagacious” and “forcible in conception, clear in reasoning.”\(^{658}\) Describing Washington’s performance in oral argument, Horace Binney, who appeared before him many times, said that he had “a great quickness and accuracy of apprehension” and that he “caught the important parts in a moment.”\(^{659}\) At another point in his memorial Binney observed: “His mind was full, his elocution free, clear and accurate, his command of all about him indisputable. His learning and acuteness were not only equal to the profoundest argument, but often carried Counsel to depths which they had not penetrated.”\(^{660}\)

David Paul Brown, another member of the Philadelphia bar, said Washington absolutely excelled as a trial judge. He was perhaps, said Brown, “the greatest nisi prius judge the world has ever known, not excepting Chief Judge Holt or Lord Mansfield.”\(^{661}\) Washington brought to the trial bench one of the most significant attributes a trial lawyer or judge can have — a knack for nearly perfect recall of the evidence. He took few notes during a trial, preferring to concentrate on the witnesses and their demeanor.\(^{662}\) Nevertheless, he was able to deliver long jury charges immediately upon conclusion of the evidence, summing up for the jury from memory,\(^{663}\) and using only rough notes as to the law.\(^{664}\)

Princeton, Harvard and the University of Pennsylvania conferred honorary LL.D. degrees upon Washington.\(^{665}\) His opinions are proof of his learning and his powers of precise analysis.

Associated with Marshall and Story in the public mind, and allied with them in most of the great constitutional decisions of the era, Washington’s judicial style differed significantly from their’s. While Marshall’s great opinions often disdain the citation of authority and rely on internal reasoning, Washington’s opinions were usually based on precedent and what he considered to be controlling authority. While Story’s opinions tend to be long discourses on the law, liberally

\(^{656}\) For a discussion of some of those inaccuracies, see supra Part I.


\(^{658}\) *Id.*

\(^{659}\) *Binney*, supra note 20, at 16.

\(^{660}\) *Id.* at 11.

\(^{661}\) *WASHINGTON*, supra note 134, at 6.

\(^{662}\) See Blaustein & Mersky, supra note 289, at 248.

\(^{663}\) See Binney, supra note 20, at 19.

\(^{664}\) See *id.* at 27.

\(^{665}\) *Washington*, supra note 67, at 334.
adorned with obiter dicta, Washington’s are precise and to the point, rarely extending beyond the specific issues necessary for resolution of the case. Washington was much less the “activist” judge than Marshall and Story and did not, as they frequently did, look for opportunities to address points of public policy not essential to resolution of the case.

Washington accepted the challenges of the “age of discovery” and confronted the multitude of issues presented by the rapid pace of change during his three decades on the bench. He looked for answers, however, in what had gone before. Merchants, businessmen, citizens, those charged with crimes, needed clear rules to govern their conduct, rules to rely on. Washington developed the rules out of the tapestry of the past. He wrote for the Supreme Court in areas where the literature of the law was rich and comparatively well-developed — admiralty and maritime cases, commercial law, real property. These materials he mined for answers to the questions presented, answers dictated not so much by the policies involved as by the solutions others had found. In this sense he was a profound conservative in an active, dynamic age.

A convinced Federalist, Washington was committed to judicial review and the vested rights of property, the twin guardians of Federalist principle and the rights of “the sovereign people” against temporary legislative majorities and “mob rule.” However, he was much less likely than Marshall or Story to use the law to enhance federal power at the expense of the states. He sought instead to avoid direct conflicts with the states, for he understood that overuse of judicial authority would deteriorate the prestige of the Court. Late in his career in 1829, he said that he had always assumed good will on the part of state legislatures in order to avoid giving offense to the states. 666 His western lands opinions illustrate this philosophy. To lend certainty to the law and due deference to the states, the rules determining contested claims to real property should depend on local law; only when the states interfere with traditional vested rights of owners, as in Green v. Biddle, will the Court step in and overrule the state legislature.

Similarly, the quest for dependable rules on which merchants and others can reliably base their conduct is illustrated by the maritime cases. For Washington, it is more important to have a precise, reliable rule than to achieve equitable results in individual cases. The occasional individual injustice is more than outweighed by the social utility of a dependable general principle.

Justice Washington deserves better treatment than he has received at the hand of history. Because he was content to work behind the scenes and accept a modest public role, his full importance to the work of the Marshall Court is hidden from us. The fact that his correspondence with Marshall has been largely lost 667 contributes to the obscurity surrounding his influence. The proposition that his influence was great, however, is proven by the fact that the “positions Washington advanced regularly prevailed.” 668

The great constitutional decisions of the Marshall Court were

666 See Blaustein & Mersky, supra note 289, at 254.
668 WHITE, supra note 15, at 351.
controversial. To stand as fundamental law, they had to win acceptance in the marketplace of ideas. Overreaching by the Court could have made this difficult or impossible. Given Washington’s close relationships with Marshall and Story, and the contrast between his style and theirs, we may speculate that his moderating influence enhanced the wisdom of the great constitutional decisions by restricting their reach.