Seriatim

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Bushrod Washington (1762–1829) lived his life in close association with two great men, and to us two hundred years later he appears to have lived entirely in their shadows. They were, of course, his uncle George Washington, who, lacking a son of his own, seems early on to have fixed upon the son of his closest brother as his principal heir, and John Marshall, seven years Bushrod’s senior, who was his fellow student of the law at William and Mary, fellow member of the Richmond bar in the 1790s, and chief justice of the United States for twenty-nine of Bushrod Washington’s thirty-one years as a judge. Washington’s modern obscurity is such as never to have earned him a book-length biography. Even his inclusion in this study of the Supreme Court before John Marshall is paradoxical, not only because he spent the bulk of his judicial career at Marshall’s left hand but because he was appointed to the Court by President John Adams in 1798 only after Adams’s first offer of an appointment was turned down, by Marshall himself.

Yet Bushrod Washington merits attention as very much his own man, significant not least for a modesty, noted even by his contemporaries, that was rather a virtue than a weakness. The tribute of Justice

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Joseph Story, his companion on the bench for seventeen years, is particularly vivid:

His mind was solid rather than brilliant; sagacious and searching, rather than quick or eager; slow, but not torpid; steady, but not unyielding; comprehensive, and at the same time cautious; patient in inquiry, forcible in conception, clear in reasoning. He was, by original temperament, mild, conciliating, and candid; and yet he was remarkable for an uncompromising firmness. Of him it may be truly said, that the fear of man never fell upon him; it never entered into his thoughts, much less was it seen in his actions. In him the love of justice was the ruling passion; it was the master-spring of all his conduct. He made it a matter of conscience to discharge every duty with scrupulous fidelity and scrupulous zeal. It mattered not, whether the duty were small or great, witnessed by the world, or performed in private, everywhere the same diligence, watchfulness, and pervading sense of justice were seen. There was about him a tenderness of giving offense, and yet a fearlessness of consequences, in his official character, which I scarcely know how to portray. It was a rare combination, which added much to the dignity of the bench, and made justice itself, even when most severe, soften into the moderation of mercy. It gained confidence, when it seemed least to seek it. It repressed arrogance, by overawing or confounding it.  

Story prefaces his character sketch thus: “Few men have left deeper traces, in their judicial career, of every thing, which a conscientious judge ought to propose for his ambition, or his virtue, or his glory.”

I quote from Story’s tribute at such length because it sets in sharp relief the character of a man who seemed never to have aimed at originality in his judicial thought, but whose character, thus sketched, nevertheless permeates his judicial opinions. Coming to the Court as the youngest man yet appointed to that body, dying in office with the longest tenure then achieved, sitting for most of his judicial career on the circuit that included Philadelphia, until recently the federal capital. All this conspired with his famous name and relation to make Bushrod Washington an important man in the early republic, a visible model of federal justice in its formative years, and a key figure for understanding the transition from the Jay and Ellsworth to the Marshall Court. He filled his role with a dedication to exact justice under law that made him, in the eyes of his contemporaries not necessarily a great statesman but a great judge—even if to modern eyes his mark has faded and so is thought not to have been made. That, again in
Story’s words, “he indulged not the rash desire to fashion the law to
his own views; but to follow out its precepts with a sincere good faith
and a simplicity” testifies to the simultaneous suppression of self and
assertion of law that typified this enigmatic and influential judge.

Preparation for “a Long judicial Life”

Bushrod Washington was born on June 5, 1762, at his family’s estate,
Bushfield, in Westmoreland County, Virginia. First son of John Au-
gustine Washington (the general’s next younger brother) and Hannah
Bushrod, bearing the names of two prominent Virginia families,
young Bushrod was tutored at home and in the house of Richard
Henry Lee. He entered The College of William and Mary in 1775,
when he was only thirteen, and graduated in 1778, while his father
served in various committees and conventions in Revolutionary Vir-
ginia. In the spring of 1780 he returned to William and Mary to at-
tend George Wythe’s lectures on the law, staying through the autumn;
it was at this time that he was, with his fellow student John Marshall,
elected a member of Phi Beta Kappa (he had been too young at the
time of its founding in 1776). The following winter, now eighteen, he
joined Colonel John Francis Mercer’s cavalry, serving as a private of
dragoons. He fought at Green Springs and witnessed Cornwallis’s sur-
render to George Washington at Yorktown in 1781.

Apparently with some help from his illustrious uncle, Bushrod
Washington removed to Philadelphia later that year to begin two
years of legal study in the offices of James Wilson, signer of the De-
claration of Independence and sometime member of Congress, who
was soon to be a leading participant in the Federal Convention and an
associate justice of the original Supreme Court. No records survive to
detail what young Washington read in 1782 and 1783 or how Wilson
may have guided him; surely he covered the classic English legal
books, from Sir Edward Coke through Sir William Blackstone, and it
would be strange if Wilson did not draw his attention to those many
parts of the latter needing modification in America, a central theme of
the “Lectures on Law” that Wilson delivered in Philadelphia less than
a decade later. (Letters do show George Washington’s concern that
his nephew keep to the straight and narrow while a student, as well as
the latter’s financial straits.) In any event, between Wythe’s lectures
and Wilson’s office, Bushrod Washington must have received the best legal education available in America at the time.

Returning to Virginia from Philadelphia, Washington began to practice law in his native Westmoreland County. In 1785 he married Julia Ann Blackburn, daughter of one of the general’s aides de camp, to whom he remained devoted, though the marriage was childless. In 1786 he helped organize the Patriotic Society, an embryonic political party, which occasioned an interesting exchange of letters with his uncle, then at Mount Vernon in anxious retirement. Bushrod wrote the general asking his opinion of a society whose object was “to inquire into the state of public affairs, to consider in what the true happiness of the people consists . . . , to inquire into the conduct of those who represent us, and to give them our sentiments upon those laws, which ought to be or are already made[,] . . . [and] to instil principles of frugality into the minds of the people, both by precept and example.” Writing in haste before a journey, George Washington voiced his disapproval:

> Generally speaking, I have seen as much evil as good result from such societies as you describe the constitution of yours to be. They are a kind of imperium in imperio, and as often clog as facilitate public measures. I am no friend to institutions, except in local matters, which are wholly or in a great measure confined to the county of the delegates. To me it appears much wiser and more politic to choose able and honest representatives, and leave them, in all national questions to determine from the evidence of reason, and the facts which shall be adduced, when internal and external information is given to them in a collective state.6

To this defense of the civic republican ideal, Bushrod Washington offers a spirited, if restrained, rejoinder. “The people are the best judges of their wants, their own interests, and can more sensibly feel those evils, which they wish to be corrected,” and “they have a right to instruct their delegates,” Bushrod wrote. The difficulty, he continued, is “that an appearance of corruption was discoverable in the mass of the people, or, what is as bad, a total insensibility to their public interest.” To respect the people’s right and at the same time to check their corruption, the Patriotic Society “of the most sensible and respectable gentlemen in this part of the country” undertook the task “of recommending to the people an attention to their own interests, and of furnishing them with the sentiments and opinions of a few,
which they may either reject or adopt.” Here, in the process of formation, is the cast of mind that established the Federalist Party over the next decade, the recognition that democratic politics requires that the people be offered structured choices and the confidence that they can be persuaded to choose a common course with the “few.”

In his politics, Bushrod Washington was from the first, as he was, if we can trust Joseph Story, to the last, “a good old-fashioned federalist” who “never lost his confidence in the political principles which he first embraced,” though “he was always distinguished for moderation, in the days of their prosperity, and for fidelity to them in the days of their adversity.” As for the spirited letter, it caused the general to retreat a bit, pleading he had not understood that Bushrod was actually a member of the society of which he spoke, restricting his objection to the use of instructions concerning continental politics, on which local information was bound to be incomplete, and then demolishing one of the Patriotic Society’s instructions that would allow the payment of taxes in staples rather than cash, a policy that had starved the army during the Revolution, he writes authoritatively. And he concludes with a question for his nephew: “How comes it to pass, that you never turned your eyes to the inefficacy of the federal government, so as to instruct your delegates to accede to the propositions of the commissioners at Annapolis, or to devise some other mode to give it that energy, which is necessary to support a national character?”

The sense of political engagement evident in Bushrod Washington’s letters makes his election the following year to the Virginia House of Delegates seem a matter of course. That he and his friends heeded his uncle’s advice on the federal question is confirmed by his election in 1788 to the Virginia convention called to ratify the Constitution. He sat with Madison and Marshall, attending regularly and voting in favor of ratification, but the record apparently attributes to him not a single speech. Writing later that year to his uncle that he had found “from Experience (the best and only safe monitor) that the cares of a plantation and the attention due to a professional life, are altogether incompatible with each other,” young Washington then left behind his family estate and his political career for Alexandria and full-time legal practice. Having only modest success in a city that was hardly thriving and having been rejected by his uncle, now president, for the position of United States attorney in Virginia for fear of the appear-
ance of nepotism, he moved again, this time to Richmond, now the state capital, around 1790. Here, in the company of the best lawyers in the state, he was soon counted among the leading members of the bar, appearing often in the Court of Appeals, sometimes with, sometimes against his friend Marshall.

When, upon the death of James Wilson in 1798, President John Adams determined to make an appointment from either Pennsylvania or Virginia and found the three Pennsylvanians on his list indisposed, Marshall and Washington were the top Federalist lawyers in Virginia. While Marshall had, the previous year, serving as a presidential envoy to France, distinguished himself for resisting French pressure in the XYZ Affair and returned a hero, Washington had devoted himself to more sedentary pursuits, earning a reputation as a legal scholar, not least for his two volumes of *Reports of Cases Argued in the Court of Appeals of Virginia*, published in 1798, a pioneering effort in an age when there were no official court reporters or systematic written opinions. He had also continued the tradition, in which he had been raised, of training young lawyers in his office, his most famous student being Henry Clay.

In late August 1798, retired president George Washington summoned Bushrod Washington and John Marshall to Mount Vernon and over the course of several days in early September persuaded them both to sacrifice their lucrative legal practices in Richmond and stand for Congress in the elections that year. Marshall turned down Adams’s offer of a seat on the Court in part to complete his (successful) campaign, but young Washington, whose ambition had turned from politics to the law, readily accepted Adams’s commission, dropping out of the congressional race and leaving immediately to attend to circuit duties. When the Senate met in December, his appointment was readily confirmed, and the following February he took his seat on the supreme bench. For the rest of his life he was a judge, though he had never before presided in a court, and his conscientious nature made him devote himself to this calling before all else. To be sure, like his fellows on the bench, he continued to campaign for Federalist presidential candidates, although he outlived his party as an organized force. He served as executor of his uncle’s will, as he had before handled his legal affairs, and after the death of his aunt in 1802 he inherited Mount Vernon, which became his permanent home and which he struggled to maintain. Responsible for George Washington’s papers,
he commissioned John Marshall to write an authorized biography and later Jared Sparks to produce an edition of the writings. He served as a vice president of the American Bible Society from its organization in 1816 until his death on November 26, 1829; he was president of the American Colonization Society from its inception on January 1, 1817, until his death. While these other activities kept him in association with the leading men of his day, they seem to have been at best distractions from his principal work: presiding twice a year at sessions of the federal circuit court (after 1802, for the Third Circuit, at Trenton, New Jersey, and Philadelphia, Pennsylvania) and sitting every winter at sessions of the United States Supreme Court.

Justice on a Court in Transition

Bushrod Washington sat on the Supreme Court for two years before that body came under the sway of Chief Justice Marshall, and the meager record that survives of his activities there and then contains little to distinguish his jurisprudence from that of his fellows. Only three of his opinions on the supreme bench were published during that span, each in a case where the opinions of all the justices sitting appeared seriatim, and in each he votes with an apparently unanimous Court and writes self-assuredly, differing from the others only in nuance. If anything distinguishes Washington’s opinions, it is his cautious determination to decide the case on the strictest grounds, eschewing an assertion of judicial power against the legislative. In the first case, *Fowler v. Lindsey* (1799), the parties to a property dispute concerning land that was claimed by both New York and Connecticut attempt to remove the case from the federal circuit court in Connecticut to the Supreme Court as a matter of original jurisdiction, on the ground that the real dispute is between the two states. The Court will have none of it, all three participating justices agreeing that the states were not, in this case, “either nominally, or substantially,” the parties. Justice Washington’s opinion here is the most thorough, treating the technical issue of certiorari and suggesting the process by which “an incorporeal right, as that of sovereignty and jurisdiction,” might be settled: a bill of equity filed in the Supreme Court by one of the states against the other, with commissioners then appointed by the Court “to ascertain and report those boundaries.”11 In *The Eliza* (or *Bas v.*
Tingy), decided the following year, the proportion of salvage awarded for the recapture of an American vessel taken by a French privateer depends upon whether the term “enemy” in a 1799 statute was meant to include France, even though no declared state of war existed between the two countries. The Court decides it does, and so upholds the circuit court award of one-half rather than one-eighth salvage, with Washington submitting the most comprehensive opinion, including an able discussion of the definition of war to settle the matter of enmity and a probing search for the “legislative will” of Congress to establish that Congress meant to change the law.12

Cooper v. Telfair (1800) was the only one of the three cases involving a matter of constitutional law.13 The case was brought in the federal circuit court for Georgia by an exiled Tory, now an inhabitant of Jamaica, contesting the confiscation of his property by the state during the Revolution, claiming a violation on the part of the state of its own constitution of 1777. In contrast to Justice Samuel Chase’s more general discussion of constitutional matters, which notes that “there is no adjudication of the supreme court itself” as to whether “the supreme court can declare an act of congress to be unconstitutional, and therefore invalid,” and which lays down that “the general principles contained in the [Georgia?] constitution [i.e., the separation of powers] are not to be regarded as rules to fetter and control; but as matter merely declaratory and directory,” Justice Washington’s reported opinion is succinct and restrained. Restricting his consideration to the question of whether the confiscation act comported with the Georgia constitution, since that act was passed before the federal Constitution was adopted with its prohibition of state as well as federal bills of attainder, Washington takes for granted the power of courts to review the constitutionality of legislation but establishes that “[t]he presumption, indeed, must always be in favor of the validity of laws, if the contrary is not clearly demonstrated.” Here the Georgia constitution “does not expressly interdict the passing of an act of attainder and confiscation, by the authority of the legislature,” so the remaining inquiry is whether by “necessary implication” of some “constitutional regulation” the act should fall. The most cogent argument he finds is the guarantee in that constitution of a jury trial “in the county where the crime was committed,” but since Cooper’s crime of taking up British arms was not committed in any Georgia county, that provision was not crossed by the confiscation. In other words, by
reading constitutional protections strictly and construing the legislative power broadly, the presumption of validity wins out and the erstwhile Tory is denied the chance of using emergent American constitutional law, so to speak, against the Revolution itself. That Washington adhered throughout his career to the presumption of validity, which was to become so central to American constitutional law,\(^\text{14}\) will become evident as we proceed.

If Washington’s brief record on the supreme bench before Marshall shows him at once in harmony with his fellow justices and consistent with his subsequent opinions, what to make of his work on circuit is another matter. When, in the waning years of his life, he collaborated with Richard Peters, Jr., son of the federal judge with whom he sat on circuit for several decades in Philadelphia, to publish the meticulous notes he had kept of his circuit opinions, the text begins in 1803, shortly after the justices resumed circuit duty upon the repeal of the Judiciary Act of 1801.\(^\text{15}\) His early years on variable circuits, sometimes in the deep South, sometimes in New York or New England, thus remain, apparently by his choice, undocumented, except in occasional newspaper accounts in an extraordinarily partisan press.\(^\text{16}\) It seems from these that he was staunch in his support of prosecutions under the Alien and Sedition Acts, and if his actions were politically colored, he would be almost unique among Virginians, for even Marshall, as a Federalist congressional candidate in 1798, had opposed the acts, albeit on prudential rather than constitutional grounds.\(^\text{17}\) Washington apparently presided at some stage of five sedition prosecutions: of Luther Baldwin and Brown Clark of New Jersey; of William Duane, editor of the Philadelphia Aurora; of Charles Holt, editor of the New London Bee; of William Durrell, editor of the Mount Pleasant (N.Y.) Register; and of Ann Greenleaf, publisher of the New York Argus. The first pair (indicted for drunken remarks) pleaded guilty and were fined; prosecution of the second was postponed, leading eventually to dismissal of the charge after Jefferson’s election; Holt was fined and jailed for a few months; Durrell was fined and jailed and ordered to post bond, but President Adams quickly remitted all but the last part of the sentence; and Adams consented to drop prosecution of Mrs. Greenleaf for political considerations.\(^\text{18}\) In short, though Washington participated in Sedition Act cases, the “chilling effect” of which ought not to be denied, and though his charges to the juries and to grand juries insisted upon the constitu-
tionality of the act, his punishments were mild by comparison to the terms of the act, and in general his actions seemed to moderate rather than promote prosecutorial zeal.

The published record does not reveal what Bushrod Washington thought of the election of Jefferson to the presidency, though apparently he had thrown his support behind not Adams but Hamilton’s candidate, Charles Cotesworth Pinckney. One supposes that he viewed the presidential election with circumspection, but surely the appointment of his old friend to the chief justiceship must have given him great satisfaction. As the studies in this collection have demonstrated, John Marshall’s innovation was not the assertion of the power of courts to set aside legislative acts as unconstitutional. This was widely presumed at the time of the Founding and admitted almost universally by the first generation of federal judges, whose youngest member Washington was. Marshall’s achievement was to persuade the Court to speak through a single opinion in most cases, abandoning the practice of seriatim opinions and coupling the authority of judicial rationality with the authority conveyed by a single voice. He was to do for American federal jurisprudence what Sir William Murray, Lord Mansfield, had done for the common law in England a generation before. How Marshall persuaded justices in the habit of seriatim expression, at least in major cases, to suppress their differences is a matter of speculation, for the new policy was not publicly discussed. Thomas Jefferson, who saw the consequences of a single opinion in strengthening the authority of the Supreme Court, later denounced the practice in private correspondence. In his first appointment to the Court, William Johnson in 1804, Jefferson chose a man who shared his opinion on this subject, though it is remarkable how often Johnson joined with Marshall in decision, even if he expressed himself independently. Johnson’s much-quoted remark on the subject in a letter to Jefferson deserves repetition, for it offers a clue to the change:

When I was on our State Bench, I was accustomed to delivering seriatim opinions in an Appellate Court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions. . . . But I remonstrated in vain; the answer was, he was willing to take the trouble, and it is a mark of respect to him. I soon, however, found the real cause. Cushing was incompetent, Chase could not be got to think or write, Paterson was a slow man and willingly declined the trouble, and the other
two judges [Marshall and Washington] you know are commonly estimated as one judge.\textsuperscript{21}

Whatever the justice or injustice Justice Johnson did to his other colleagues—Cushing was old, and Chase after all had troubles that might have made silence the prudent course—his mention of the close relation between Marshall and Washington is suggestive. In the friendship, personal, legal, and intellectual, of John Marshall and Bushrod Washington lay a key to the Supreme Court’s newfound unity, perhaps in the modest deference of the younger to the senior and in the respect of the senior for the legal scholarship of his longtime associate at the bar.

To say that Bushrod Washington’s contribution to the Marshall Court, or to the transition to the Marshall Court, lay in his silence, then, is not to indulge in postmodernist wordplay but to take note of the significant change in judicial practice that characterized the new era. In \textit{Marbury v. Madison}, \textit{Fletcher v. Peck}, \textit{McCulloch v. Maryland}, and \textit{Gibbons v. Ogden}, Washington silently joined the chief justice’s opinion, and no one can know what influence he may have exerted on the product. The remarkable living arrangements of the Marshall Court, with the justices boarding together in a single house in the new capital, sharing meals and conversation, working with extraordinary speed and decision during their brief late winter term, without separate offices, not to mention separate clerks, suggest that Washington’s contribution was substantial. What seems clear in the case of Justice Washington is that, for the remainder of his career, that is, from the time he was about forty until his death at age sixty-seven, his judicial thought on matters of concern to the Supreme Court must be seen in relation to Marshall, for that is how he seems to have seen it himself.

Two cases from their first years on the Court together offer a glimpse of such differences as are discoverable between Marshall and Washington. Both involve the interpretation of federal statutes, and in each Marshall writes an opinion of the Court that overturns a decision Washington himself made on the circuit level. In fact, both cases, which arose at circuit in April 1803, might be said to be holdovers from the Federalist era, since the statutes in question date from the 1790s. The first was the case of \textit{Coxe v. Penington}, or later, \textit{Pennington v. Coxe}, a test case devised to determine the tax due on sugar that
had been refined but not sold as of the time the tax was repealed. At the circuit level, Washington had distinguished the refining of the sugar and the “sending out,” holding the tax accrued at the first stage, to be collected at the second; he based his interpretation upon both the language of the statute in question and “the general system of duties and excises imposed upon other subjects,” especially the tax on distilled spirits, which typically distinguished the “event . . . upon which the duty accrues” from the time of payment. Reversing him the following year, in an opinion several times the length, Marshall concedes that “[t]he court has felt great difficulty on this point. It is one on which the most correct minds may form opposite opinions, without exciting surprise.” His opposite conclusion depends in part on a different reading of the language of the act but also on a different assessment of what “general system” is to be invoked. “It has very properly been observed at the bar, that it was most apparently the object of the legislature through their whole system of imposts, duties and excises to tax expense and not industry,” suggesting the tax accrues when the sugar is “sent out” and presumed sold, not when it is refined; as for the different modes of taxing distilled spirits and refined sugar, “[w]here the legislature distinguishes between different objects, and in imposing a duty on them evidences a will to charge them in different situations, it is not for the courts to beat down these distinctions on the allegation that they are capriciously made, and therefore to be disregarded.” While Washington sought a distinction that would maintain a certain symmetry in the statutory scheme, Marshall by contrast looks to the “real effect of the law” and defers to mere legislative will.

The other case, United States v. Fisher, was the more important of the two, both for the law itself and for understanding the differences between Washington and Marshall, since it involved a question of bankruptcy, the one issue on which the two judges were to differ dramatically later on. In question was whether a 1797 statute giving the United States priority in the collection of debts owed to it by an insolvent or bankrupt “revenue officer, or other person” should be read literally, to give the United States priority in any case where the bankrupt has a federal debt, or restrictively, so that federal priority attaches only to revenue officers and certain specified others. At circuit, Washington took the latter view: Since the title of the statute was “An Act to provide more effectually for the settlement of accounts between the
United States and receivers of public money,” and since the other sections of the act concerned only such people, the “other person[s]” of section 5 of the act should be read to mean “other persons accountable for public money.” He explained his principle of interpretation as follows:

Where a law is plain and unambiguous, using either general or limited expressions, the legislature should be intended to mean what they have plainly expressed, and no room is left for construction. But, if from a view of the whole law taken together, or from other laws in pari materia, the evident intention is different from the import of the literal expressions used in some part of the law, the intention ought to prevail, for that in truth is the will of the law-makers. So, if the literal expressions would lead to absurd or unjust consequences, such a construction should be given to avoid such consequences, if, from the whole purview of the law, it can fairly be made. These rules are founded in law, and in plain honest good sense.

As he put the matter in his restatement on appeal, “These rules are not merely artificial; they are as clearly founded in plain good sense, as they are certainly warranted by the principles of common law.” That the consequences of a literal and hence expansive reading of the clause will be harmful, Washington has no doubt:

As to public officers and agents, they are or may be known, and any person dealing with them does it at the peril of having his debt postponed to that of the United States—he acts with his eyes open. But if this preference be extended to all persons dealing with the government, there is no mode by which other citizens can be put on their guard against them, and consequently all confidence between man and man will be destroyed.

Marshall begins the opinion reversing Washington with a conciliatory claim: “On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself.” But to rely upon practical judgment in the law itself supposes a confidence in the capacity of the judge to distinguish the weight of different causes, and Marshall concedes as much by formulating the following principle:

That the consequences are to be considered in expounding the laws, where the intent is doubtful, is a principle not to be controverted; but it is also true
that it is a principle which must be applied with caution, and which has a
degree of influence dependent on the nature of the case to which it is ap-
plied. Where rights are infringed, where fundamental principles are over-
thrown, where the general system of the laws is departed from, the legisla-
tive intent must be expressed with irresistible clearness to induce a court of
justice to suppose a design to effect such objects. But where only a political
regulation is made, which is inconvenient, if the intention of the legislature
be expressed in terms which are sufficiently intelligible to leave no doubt in
the mind when the words are taken in their ordinary sense, it would be
going a great way to say that a constrained interpretation must be put upon
them, to avoid an inconvenience which ought to have been contemplated in
the legislature when the act was passed, and which, in their opinion, was
probably overbalanced by the particular advantages it was calculated to
produce.

That “only a political regulation” is at issue in the matter of federal
priority Marshall makes clear in his opinion, though he does consider
a constitutional objection to such a regulation, construing for the first
time (a decade and a half before *McCulloch*) the necessary and proper
clause: “Congress must possess the choice of means, and must be em-
powered to use any means which are in fact conducive to the exercise
of a power granted by the constitution.”

Although the decision in the Supreme Court was, strictly speaking,
umanimous, since Washington, following the custom of the Court, re-
cused himself from review of his own circuit judgment, he took the ex-
traordinary, perhaps unique, step of having the reporter publish a de-
fense of his decision below, since “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.” Here he repeats and elaborates the
argument from his as-yet-unpublished circuit opinion, even reiterat-
ing his fear that the Court’s interpretation “would intend to destroy,
more than any other act I can imagine, all confidence between man
and man.” Seen in the light of *Pennington v. Coxe*, Washington
again seems focused on the formal symmetry of the law, Marshall on
legislative prerogative and judicial acquiescence, at least in matters of
ordinary concern. Why the heat, to us today so apparently exagger-
ated, about the crisis of “confidence between man and man” should
appear from the discussion that follows.
For the remainder of his judicial career, the appellate cases that seemed most earnestly to engage the attention of Justice Washington and that led him to distinguish himself most clearly from the chief justice were those involving contracts, and so in constitutional law he wrote especially about the contract clause. Because this clause appears in the Constitution as a limit on the legislative authority of the states, it is important to make clear at the outset how a concern for the sanctity of contracts is consistent with the probing search for legislative will that characterizes even the earliest of Washington’s judicial opinions. “All confidence between man and man,” that is to say, society itself, is at risk when the rights of contract are obscured precisely if society itself is based upon a social contract, if the terms of social engagement are themselves a matter of human agreement. From this point of view, respect for the legislative will has a certain paramountcy, since that will establishes authoritatively the terms of social agreement, there being no other living source of law. At the same time, the legislative will might be governed by a written constitution, itself almost a social contract, as well as interpreted in the spirit of fair agreement and even limited by the need to reserve to individuals the liberty to make agreements or contracts to govern their own affairs and by the duty to see such contracts enforced. It is not that the theory of the social contract was the only account of social cohesion available to Bushrod Washington. It suffices to recall that he lent his name as a vice president to the American Bible Society, formed largely by laymen to supply Bibles for missionaries seeking to evangelize the western frontier, and he was himself, according to Story, “a Christian, full of religious sensibility, and religious humility.” But however he may have viewed religion as an underlying social bond, he seems to have thought it secondary in civil affairs, or to have interpreted faith in the light of contract or covenant rather than the reverse. Nor was he, like Story, to seek in common law an inherited source of authority or an emerging science, at least not immediately or ordinarily. Contract, rather, lay at the root of man’s civil and legal affairs, with Christianity or common law offering nourishment rather than an anchor.

Washington’s interest in contract law appears in the pages of the Supreme Court reporters, for he was often called upon to offer the opinion of the Court in cases involving contract or commercial law.
that lacked a constitutional dimension. In the leading constitutional contract clause case of his era, *Trustees of Dartmouth College v. Woodward*, Washington was not content to leave expression of the case solely to the chief justice, though he apparently joined his opinion. In an opinion less prolix than the chief’s and considerably less than his colleague Story’s, Washington holds that the original royal grant to the college established “an obligation of the nature of a contract” on the part of the state toward the founder and the corporation. Then he explains how the statute impairs the obligation of the charter/contract: “all these powers, rights, and privileges [of a charitable corporation] flow from the property of the founder in the funds assigned for the support of the charity,” and so cannot be unilaterally altered by the state.

Another important example of his uncompromising voice on the Court for the adherence to contract comes in the case of *Green v. Biddle*, in which Washington on rehearing strengthens Story’s decision invalidating a Kentucky law that allowed interim possessors of disputed land compensation for improvements they made before their titles were proven bad. This statute, Washington finds, impairs Kentucky’s obligation under a 1789 compact with Virginia pledging to maintain land titles; indeed, he finds the rightful owners not only free from having to pay for the squatters’ improvements but entitled to their profits. Whatever the sentimental case for those seeking compensation, Washington writes, “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 the decision what they may be.”

*Dartmouth College* and *Green v. Biddle* were, in their own way, isolated cases dealing with special circumstances, even if the former was to become an influential precedent. The bankruptcy cases, by contrast, unfold a drama, not least for the relation between Washington and Marshall. The story begins in the Third Circuit, with Washington’s remarkable 1814 opinion in *Golden v. Prince*. Here the defendant sought to bar an action for the collection of a debt by claiming discharge under a Pennsylvania insolvency act. After entertaining and dismissing an attempt to use the Judiciary Act of 1789 to override the state insolvency law, Washington examines the latter’s constitutionality and finds it doubly wanting. First, as applied in this case, where the debt was incurred before passage of the act that purports to
discharge the debtor, the act is an unconstitutional impairment of contract because it would have altered the terms of a contract retrospectively. Second, even prospectively the act would fail, according to Washington, because the Constitution confers on Congress exclusive power over the issue of bankruptcy. He arrives at this opinion in part through a close reading of the text (it is implied, he thinks, by the stress on “uniform laws on the subject of Bankruptcies” in Article I, section 8, not to mention by being coupled with the naturalization power) but also by his insistence that there must be a way for Congress to establish the policy that there will be no bankruptcy in the United States, that is, no forced insolvency and subsequent discharge of debts. He writes in his opinion, “[W]e hold it to be our duty to embrace the first opportunity which presents itself, to express the unhesitating opinion which we entertain upon these great questions, and thus to pave the way for as early a decision of them, as possible, by the supreme national court.”

Though this case was not to be appealed, Washington got his wish a few years later, when, during the busy spring when the judges decided *McCulloch v. Maryland* and *Dartmouth College*, the case of *Sturges v. Crowninshield* came before the Supreme Court.

Marshall wrote the only opinion in *Sturges*, apparently for a unanimous Court, but it is clear from the drift of the case and from what was revealed about it eight years later in *Ogden v. Saunders* that Washington had to be persuaded that his “unhesitating opinion” in *Golden v. Prince* would not become the law of the land, at least not in all respects. At issue in *Sturges* was a situation not unlike that before Judge Washington in 1814: The defendant in a suit to recover a debt pleaded his discharge under a state insolvency act (here, New York’s) passed after the debt was established. Marshall reverses the order of the issues, beginning with the question of whether any state has the authority to pass a bankrupt law. The complication he discovers comes in discerning the difference between a bankruptcy law and an insolvency law; he acknowledges that the states have unquestioned authority to pass laws of the latter sort, while the Constitution gives Congress power to pass the former, but since the distinction between insolvency and bankruptcy is unclear, it is inadequate to serve as a bright line between two grants of exclusive authority. The way out is to hold the power over bankruptcy concurrent in the federal government and the states, so that Congress having chosen not to act
on the subject of bankruptcy, power remains in the states to treat the matter in the first instance. The application of the law in question here, however, falls before the contract clause, since it seeks to operate retroactively upon a contract, that is, it operates to impair the obligation. Marshall is willing to concede the distinction between the obligation of a contract and the remedy the law affords; this allows for statutes of limitations, which are thus not said to impair the obligation of contracts. But here the insolvency law attempts to nullify the contract itself, not just tailor the remedy, and so fails the constitutional test.33

If Washington suppressed his doubts in *Sturges*, eight years later, in *Ogden v. Saunders*, he breaks with Marshall, driving him to a rare dissent in a constitutional case. (Actually, Marshall’s famous “dissent” is technically a concurrence, for, although he is in the minority on the question of the constitutionality of state bankruptcy laws, Justice Johnson votes in the end to sustain the debt, on the ground that the New York insolvency law, though valid to relieve a debtor in New York, need not be recognized in federal court in Louisiana.) Though Marshall characteristically writes for the dissenters as a bloc, that is, for Justices Story and Duvall as well as himself, the majority opinions on the constitutional question are delivered seriatim, now, however, with the senior justice (Washington) first, rather than the junior justice, as in the 1790s. Washington’s opinion is remarkable not only for its careful reasoning and modest expression—these are the hallmarks of his jurisprudence, after all—but for his admission that he continues in the opinion that the Constitution intended for Congress to have exclusive power to establish bankruptcy laws, “[b]ut it becomes me to believe, that this opinion was, and is, incorrect, since it stands condemned by the decision of a majority of this court, solemnly pronounced.”34

Washington’s argument in this case depends upon two distinctions: between a contract and its obligation, and between retrospective and prospective laws concerning contracts. The contract is, of course, the agreement, while the obligation, writes Washington citing Marshall in *Sturges*, is “the law which binds the parties to perform their agreement.” This law is neither the moral law nor the “common law of nations,” although these stand behind the law; it is the binding, positive “municipal law of the state” where the contract is made. The obligation of a contract is colored in many ways, by the laws of evidence, or
laws of remedies, or statutes of limitations, and the like. This amal-
gam of municipal laws “forms, in my humble opinion, a part of the
contract, and travels with it, wherever the parties to it may be found.”
What is crucial is that the laws operate only prospectively, for only in
that way can they be considered incorporated into a contract without
gross fiction. The constitutional ban on the impairment of contracts,
then, is not a substantive limit on the legislative power of the states
but a prohibition against the alteration of contracts already made.
Washington reinforces this point with a close reading of the text of Ar-
ticle I, section 10: The prohibition against impairing the obligation of
contracts is grouped by punctuation not with the legal tender clauses
but with the prohibition against bills of attainder and ex post facto
laws. And he concludes his opinion as he began it, with expression of
doubt as to the correctness of his views, but then confident assertion:
“But if I could rest my opinion in favor of the constitutionality of the
law on which the question arises, on no other ground than this doubt
so felt and acknowledged, that alone, would, in my estimation, be a
satisfactory vindication of it. It is but a decent respect due to the wis-
dom, the integrity and the patriotism of the legislative body, by which
any law is passed, to presume in favor of its validity, until its violation
of the constitution is proved beyond all reasonable doubt.”35 That his
adherence to the presumption in favor of state legislation gives Wash-
ington’s jurisprudence a distinctive character can be seen by contrast-
ing his opinion to Marshall’s, for the latter insists that the Constitu-
tion’s ban on laws impairing the obligation of contracts is not limited
to retrospective legislation but has its origin in a duty to enforce the
natural-law obligation of contracts and in the intention of the framers
of the Constitution to stop the interference with the relative situation
of creditors and debtors by state legislatures that was tending to “de-
stroy all confidence between man and man.”36

The coda to the debate over contracts comes in the case reported
immediately after Ogden v. Saunders in Wheaton’s Reports, namely
Mason v. Haile, where Justice Washington delivers a rare, lone dissent
to the opinion of the Court by Justice Smith Thompson.37 The Court
upholds the constitutionality of a peculiar insolvency arrangement in
Rhode Island, whereby a debtor petitions the state legislature “for the
benefit of the insolvent act of 1756,” not otherwise in force, and the
legislature, in granting the petition, releases the individual from his
debs and, in this case, from prison. The Court finds the prison bond
under which Haile was confined to have been “given subject to the ordinary and well-known practice in Rhode Island” of petitioning the legislature for discharge. Justice Washington, however, in an opinion delivered orally but not written, objects that the principle of prospectivity is violated here, since the contract involved in the prison bond had no provision for discharge, and the act of 1756 was not generally in force and so incorporated into the bond contract. Washington’s singular leniency in giving the state legislatures room to experiment with the conditions of contracts translates, upon his strict distinction of prospectivity and retrospectivity, into singular harshness in the enforcement of contracts already made, even for debtors’ imprisonment.

Enforcing the Law in Pennsylvania and Virginia

Washington’s usual reticence on the Supreme Court in the District of Columbia obscures, to the modern observer, what was called in a tribute at his death “the principal theatre of his judicial operations,” the federal Circuit Court for the Third Circuit, especially as it sat in Philadelphia. Here, in the city where he had served his legal apprenticeship and that was still capital of the United States when he was first appointed to the Supreme Court, Washington became a favorite of the bar during his nearly thirty years assigned to its circuit. If his Supreme Court opinions are modest, even diffident in tone, his circuit opinions, which usually take the form of charges to the jury (who seem always to act as he directs) bespeak the confident authority of one who sees himself as the embodied voice of federal law. Business varied in his time on the court, the early years dominated by marine insurance cases, later years giving rise to more general commercial cases and to patent cases, with procedural issues of evidence and jurisdiction always prominent. Though it would be beyond the bounds of this essay to survey his circuit judgments in great detail, his portrait would be incomplete without some mention of his work as a federal trial judge.

High praise to Washington in this capacity came in a memoir on the Philadelphia bar by David Paul Brown, presumably an eyewitness:

Perhaps the greatest nisi prius judge that the world has ever known, not excepting Chief-Justice Holt or Lord Mansfield, was the late Justice Washington. It is impossible to conceive of a better judicial manner, and, when
to that is added great legal acquirement, great perspicuity and great-mindedness, exemplary self-possession and inflexible courage, all crowned by an honesty of purpose that was never questioned, he may be said, in the estimate of the bar and the entire country, to have stood among the judiciary, as *par excellence*.

One finds little or nothing in the reports he assembled to contradict this assessment, and much to confirm it. In criminal cases, for example, one can recognize in his jury charges a scrupulous attempt to present the law with perfect clarity and fairness. In an 1804 case, Washington carefully explains to the jury that an indictment for perjury in bankruptcy proceedings cannot succeed after the bankruptcy law on which the prosecution was founded has been repealed; in 1805, he directs a verdict for acquittal against the charge of murder on the high seas, when the death in question occurred on land, and Congress had made no separate provision for such a circumstance; in 1814, he protects a man from a charge of treason by narrowly construing the intention of his alleged overt act. His most spectacular case came in 1809 and involved the prosecution of a Pennsylvania militia officer for resisting a federal marshal at the direction of the state legislature and the governor. The case dated back to the Revolution and involved a Pennsylvania court prize award overturned by a special court of appeal established by Congress, the money, however, remaining in official hands in the state in defiance of the federal decree. Finally in 1803, process is renewed in the now-established federal district court, the state government resists, but finally the militia yields to the marshal and the money passes to federal hands and is properly awarded. An interested Philadelphia crowd was on hand for the trial of militia General Michael Bright, but Judge Washington merely adjourned the court until the following day in a larger courtroom and delivered a charge that vindicated the federal legal claim: “It is a truth not to be questioned that the power to declare the judgments of your courts void can never be safely lodged with a body who may enforce its decision by the physical force of the people. This power necessarily resides in the judicial tribunals, and can safely reside nowhere else.” He then concluded:

We enter not into the political discussions which have been so ably conducted on both sides, but we admonish you to discard from your minds all political considerations, all party feelings, and all federal or state preju-
The jury convicted the defendants on a special verdict, they were fined and imprisoned by the court, but they were “immediately pardoned by the president of the United States.”

If Washington was at his best in Philadelphia as the staunch defender of federal law without regard for popular sentiment, the less pleasant side of his unyielding support for positive rights and contempt for public opinion appeared when the issue of slavery arose, especially after the crisis of 1820. If the indices to his Reports are to be trusted, issues involving slavery came before his circuit court three times in almost thirty years. The first, in 1806, was a suit for his freedom by a servant of Pierce Butler, who established a house in Philadelphia during his time as a member of Congress from South Carolina but stayed on, only occasionally visiting his old plantation. The jury having ruled Butler a resident of the city, Judge Washington found him outside the exception for members of Congress or sojourners in the Pennsylvania emancipation statute of 1780, thus setting Ben Hopper free. The same term, Washington read a pair of federal statutes narrowly to defeat a prosecution for slave trading against an American ship that had transported two French ladies and their attendant slaves from St. Thomas to Havana in the Caribbean. A case some fifteen years later involves a similar statute and the transport of a slave who is later sold at the destination; Washington repeats the narrow reading but leaves the matter to the jury, and an acquittal follows, perhaps, the record hints, because the witness was unreliable.

If there is nothing remarkable about these cases, Washington’s personal involvement with the institution is more complex. As executor of General Washington’s will, he was responsible for freeing his slaves upon his widow’s death, and apparently did so, but to maintain Mount Vernon, he brought in new slaves of his own. In 1821, after four years as president of the Colonization Society, which had begun to make arrangements to establish a colony in Africa for free blacks, Washington’s financial troubles at the plantation led him to sell about fifty slaves to two Louisiana dealers. The press found out and an angry exchange followed, with Niles’ Weekly Register commenting,
“[T]here is something excessively revolting in the fact that a herd of them should be driven from Mount Vernon, sold by the nephew and principal heir of GEORGE WASHINGTON, as he would dispose of so many hogs or horned cattle; violating every tie that fastens on the human heart, and dissolving the connection of husband and wife, mother and child.” Washington’s lengthy reply is more revealing than he probably intended, both of his personal affairs and of the hardening of attitudes starting to take place on the slavery question. Admitting that humanity requires the attempt to keep families together, he insists on his efforts in this sale, families having been separated only when a few slave husbands owned by neighbors refused to be sold south, though he comments that it is “an extraordinary circumstance” that “so much sensibility should be felt” at the separation of slave families when emigration of whites to America routinely involves family separation. As to the necessity of the sale, he cites: his financial straits in maintaining the plantation; “the insubordination of my negroes, and their total disregard of all authority,” a circumstance he blames on the steady stream of visitors to Mount Vernon, some of whom have presumed the slaves there to have belonged to the late general and thus to be owed their freedom, now or “at my death”; and the likelihood of “the escape of all the laboring men of any value, to the northern states, so soon as I should leave my home,” several having “eloped without the pretense of a cause” the previous year. Seeing the whole controversy as designed to embarrass the Colonization Society, Bushrod Washington “take[s] the liberty, on my own behalf, and on that of my southern fellow citizens, to enter a solemn protest against the propriety of any person questioning our right, legal or moral, to dispose of property which is secured to us by sanctions equally valid with those by which we hold every other species of property.”45 Here is exact justice with a vengeance, excused, perhaps, by the judge’s having overlooked the maxim against sitting in judgment of one’s own cause.

Law and Liberty

For the most part, then, Washington’s contribution to the founding of the federal judiciary consisted in his steady enforcement of the written law and his fidelity to the sanctity of contracts. Story’s observation of
the marriage of mildness and firmness in his jurisprudence is apposite, for Washington was mild in deferring to statute and precedent as he understood them but firm in resisting the temptation to indulge either popular sentiment or noble rhetoric. He was a Federalist to the end in his support for the sanctity of property rights, but his emphasis on the importance of contract and his reluctance to build a jurisprudential system from the common law distinguished him not only from some of his colleagues on the bench in the 1790s but also from the judicial conservatives James Kent and Joseph Story who came to dominate legal scholarship in his later years. Friend to Marshall off the bench and on it, perhaps the key figure in establishing the deference of the associates to the chief, his work on the Court formed, in some respects, a bridge even beyond the Marshall Court to the Taney era, for his cautious opinion in *Ogden v. Saunders* anticipated the sort of delicate balancing of federal power, property rights, and state legislative authority that came to characterize the work of Marshall’s successor—even as his staunch defense of slaveholders’ rights anticipated that Court’s darkest hour. Indeed, his influence might even stretch further because he was apparently an author of the doctrine that corporations ought to be considered citizens of the state in which they were incorporated for purposes of federal law, accepted by the Court in 1844 and used as the jurisdictional entry for much of the federal courts’ business as the century progressed.\(^\text{46}\)

In one of those odd but familiar instances in American constitutional law, Bushrod Washington is perhaps most commonly encountered by students today in a circuit case decided late in his career that later took on added importance thanks to developments he could hardly have anticipated. The case is *Corfield v. Coryell*, in which the issue is whether New Jersey can justifiably restrict fishing in its oyster beds to its citizens, and Washington, again anticipating the jurisprudence of the Taney Court, decides that it can. Citing dicta in *Gibbons v. Ogden* (the *Corfield* case apparently came to the circuit before the decision in *Gibbons*, but argument and decision were delayed until after), Washington insists that states reserve power to regulate their internal trade, not to mention “the right . . . to legislate, in such manner as in their wisdom may seem best, over the public property of the state”; and the Privileges and Immunities Clause of Article IV he confines, with “no hesitation,” to “those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citi-
zens 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."
47 Although the acknowledgment of extensive legislative authority in the
states is characteristic of Washington throughout his career, the distinc-
tion between the fundamental and the incidental among rights,
and the remarkable list of the former—including rights to protection,
to the enjoyment of life, liberty, and property, to travel, to the writ of
habeeus corpus, to sue, to nondiscriminatory taxation, and to vote—
seem more in the spirit of John Marshall or, for that matter, of James
Wilson than of this usually cautious expounder of the letter of the law.
Still, the passage from Corfield v. Coryell, known, of course, because
of its quotation in The Slaughter-House Cases when a later Supreme
Court begins the historic task of interpreting the Fourteenth Amend-
ment, is in a sense a fitting tribute to this friend of Marshall’s and heir
of Washington’s, for it articulates not only the justice of the law but
its role as the source of liberty. In this Bushrod Washington professed
sincerely to believe, and it would be churlish to deny his contribution
to its achievement.

NOTES

1. William W. Story, ed., The Miscellaneous Writings of Joseph Story (Boston:
Charles C. Little and James Brown, 1852), 809; quoted in 3 Peters x–xi.
2. This phrase is from a tablet erected in his memory by the Philadelphia bar,
the text of which is reproduced in 3 Peters xiii.
3. I have relied on the following sources for biographical information: Clare
Cushman, ed., The Supreme Court Justices: Illustrated Biographies, 1789–1993
(Washington, D.C.: CQ Press, 1993), 51–55; Albert P. Blaustein and Roy M. Mer-
sky, “Bushrod Washington,” in Leon Friedman & Fred L. Israel, eds., The Justices
of the United States Supreme Court, 1789–1969: Their Lives and Major Opin-
ions (New York: Chelsea House, 1969), 1: 243–257; Bushrod C. Washington,
“The Late Mr. Justice Bushrod Washington,” Green Bag 9 (1897): 329–335;
Joseph Hopkinson, Eulogium in Commemoration of the Hon. Bushrod Wash-
ington (Philadelphia: T. S. Manning, 1830); and especially David Leslie Annis,
“Mr. Bushrod Washington, Supreme Court Justice on the Marshall Court” (Ph.D.
diss., Notre Dame University, 1974).
4. See Robert Green McCloskey, ed., The Works of James Wilson (Cam-
7. Ibid., 72, 71.
10. Quoted in ibid., 57.
11. 3 Dallas 411; the quotations are all from Justice Washington’s opinion, at 412–13.
12. 4 Dallas 37, at 42.
13. 4 Dallas 14; Chase’s opinion is at 18–19, Washington’s at 18.
20. See his letters to Thomas Ritchie (December 25, 1820) and Justice William Johnson (October 27, 1822, and June 12, 1823), in Thomas Jefferson,

25. 1 Wash. C.C. at 8.
27. Ibid., at 398, 402.
29. See, e.g., Eliason v. Henshaw, 4 Wheaton 225 (1819); Thornton v. Wynn, 12 Wheaton 183 (1827); Buckner v. Finley and Van Lear, 2 Peters 586 (1829). The Thornton case is an especially elegant example of judicial reasoning in the common law of contract.
31. Green v. Biddle, 8 Wheaton 1 (1821, 1823); Washington’s opinion begins at 69, with the quotation from 93.
33. Sturges v. Crowninshield, 4 Wheaton 122 (1819).
34. Ogden v. Saunders, 12 Wheaton 213 (1827), at 264.
35. Ibid., at 259, 270.
36. Ibid., at 355.
37. 4 Wheaton 370; Washington’s dissent begins at 379.
39. See the indices to the four volumes of Washington’s Reports, cited above.
43. The Pennsylvania militia figured as well in a notable Supreme Court decision concerning criminal law rendered by Washington: Over the dissent of Justice Story and one other justice unnamed, but with the authority of The Federalist Papers in his favor, Washington held that the states and the federal government had


