The Role of Circuit Courts in the Formation of United States Law in the Early Republic

Following Supreme Court Justices Washington, Livingston, Story and Thompson

David Lynch

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INTRODUCTION

I make it plain from the outset that this volume is not a legal, political, economic or constitutional history of the Early Republic. Its object is to record the results of my research into the part played by four prominent United States Supreme Court Justices in the development of United States law through their work in the circuit courts during the Chief Justiceship of John Marshall.

Having been involved in the study of English law for over 60 years, my life has revolved around guideline cases of the House of Lords and Court of Appeal with only a passing interest in United States law. It was whilst, after retirement, having commenced a Master of Research degree which included a dissertation on 'Cherokee Removal Discourse in Jacksonian America' that my interest in the early days of the United States Supreme Court began. I read the Court's Native American opinions and, in particular, those affecting the rights of Cherokees. Having been impressed by the measured dissent in favour of the Cherokee Nation by Justice Smith Thompson, joined in by Justice Joseph Story, in the 1831 case of *Cherokee Nation v Georgia,* I was interested in a closer examination of the contribution of both justices to the growth of United States law.

Whilst aware of the Supreme Court justices' role when sitting together in the nation's capital, further investigation revealed the significant impact they had on the development of federal law when sitting on circuit at first instance or by way of appeal from a district judge. Having reviewed the modern scholarship, it quickly became clear that much time and effort had been properly paid to the role of the Supreme Court in the formation of federal law, but the workload of the early 'inferior' federal courts had received scant attention despite calls by several scholars to examine the place of the circuit courts in United States legal history.

Frankfurter & Landis (1928) were alert to the need for detailed studies of the circuit and district courts for a better understanding of the nation's history.[1] Scholars have examined different aspects of their suggested research. In a 1970 exploratory essay on Justice Story's time on the First Circuit, Newmyer, when referring to the circuit courts, observed that 'there has been no comprehensive effort to understand their operation or assess their influence on society and on the development of American law and legal institutions'.[2] Tachau (1978) also appreciated

[1] Felix Frankfurter and James M Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New Brunswick: Transaction Publishers, 2007), 52–53, n 174. Originally published in 1928 by The Macmillan Company.

[2] R Kent Newmyer, 'Justice Joseph Story on Circuit and a Neglected Phase of American Legal History' (1970) XIV *The American Journal of Legal History* 112–35.

the need for further circuit court research when examining the cases of District Judge Harry Innes, the federal district judge of Kentucky between 1789 and 1816, who exercised circuit court jurisdiction in Kentucky until the appointment of Supreme Court Justice Thomas Todd to the 7th Circuit in 1807.[3] In 1997, Johnson was another who felt that the justices' work on circuit 'deserves far more attention than it has been given in the past'.[4] He began the task of remedying that neglect in a book chapter on 'The Circuit Courts and the Projection of Federal Power'.[5] In a 2009 essay on Justice Bushrod Washington, Johnson, when referring to the justices' circuit work, declared that 'It is in this multitude of cases that Washington and his fellow justices made their greatest contribution to the advancement of federal justice in the young republic', pointing to the 30 volumes of the *Federal Cases* as a starting point, in the case of Washington, to prove his worth as a judge.[6]

More recently, Graham (2010), citing Frankfurter, Landis and Tachau, noted that 'legal historians have focused on the significance of the Supreme Court, its decisions, and its justices', complaining that 'not only have the lower courts been ignored, their significance has even been questioned'.[7] Graham has furthered the scholarship on the 'inferior courts' by a detailed study of the circuit and district courts of Rhode Island, a constituent part of the First Circuit, between 1790 and 1812. La Croix (2012) is another who writes of the tendency of historians 'to focus on the on the Supreme Court alone, to the exclusion of the lower federal courts'. She observes that those who have devoted attention to the lower federal courts 'have largely neglected the history of how those courts developed beyond the early moments of the Constitutional Convention and the First Congress'.[8] LaCroix's paper does not seek to examine the workload of the circuit courts. Rather it is a penetrating insight into the Federalist view that extending judicial power to the 'inferior' federal courts was key to national supremacy.[9]

The nature and extent of the research referred to above will be developed in greater detail in later chapters. Here I have given only a brief outline to justify a

[3] Mary K Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky. 1789–1816* (Princeton, New Jersey: Princeton University Press, 1978). Tachau records the arrival on circuit of Justice Todd but does not examine his circuit work as her focus is on District Judge Harry Innes. Her pupil Glenn Forrester Taylor continued this aspect of research in a 1989 MA thesis at the University of Louisville entitled, 'Jurisdiction in the 7th Circuit, District of Kentucky, 1807–1817'.

[4] Herbert A Johnson, *The Chief Justiceship of John Marshall, 1801–1835* (Columbia: University of South Carolina Press, 1997), 6.

[5] ibid, 112–37.

[6] Herbert A Johnson, 'Bushrod Washington' (2009) 62(2) *Vanderbilt Law Review* 447–90 at 488–89.

[7] D Kurt Graham, *To Bring Law Home: The Federal Judiciary in Early National Rhode Island* (Dekalb: Northern Illinois University Press, 2010), 5. Graham's reference to the questioning of the value of circuit court opinions stems from the unreliable statistics of the number of successful appeals from circuit opinions which Charles Warren took from *Niles Register* of 10 April 1830 and used in his *A History of the American Bar* (Boston: Little Brown, 1911), 406.

[8] Alison L LaCroix, 'Federalists. Federalism, and Federal Jurisdiction' (24 February 2010) Final revised edition of 8 November 2012 in (2012) 30 *Law and History Review,* 205–44 at 206. University of Chicago Public Law Working Paper No 297. Available at SSRN: https://ssrn.com/abstract=1558612.

[9] ibid, 207.

response to the calls for further research into the role of the early circuit court in the development of United States law. Whilst using several sets of reports, I followed Johnson's suggestion of the *Federal Cases* as the basis of any investigation into the value of the justices' time on circuit. I extracted, read and noted up the 1377 reported circuit court opinions of the 14 Marshall Court associate justices. Having taken the view that scholars of legal history have focused on Chief Justice Marshall and that his associates had received comparatively scant attention, I decided not to examine the opinions of the Chief Justice but those of his brethren.

As an analysis of the circuit opinions of the Chief Justice and all 14 justices was clearly beyond the scope of a doctoral thesis, I decided to read those of four prominent associates (Washington, Livingston, Story and Thompson) who sat in busy commercial centres and whose tenures, taken together, spanned the era of the Marshall Court. Those circuit court opinions were key to ascertaining how the circuit experience shaped Supreme Court attitudes and the Chief Justice's opinion assignment choices. I also explored, at a time when there were few federal statutes and Supreme Court opinions to guide them, the sources upon which the justices drew to establish a body of federal law and how they attempted to achieve a consistent approach to federal law and procedure across the circuits. Today's judges have the advantage of law reports immediately available online or on disc and an experienced colleague within easy reach to help resolve a difficult point of law or procedure. Not so in the early days: a justice might find himself on circuit without a law library requiring assistance with an unfamiliar branch of the law when support from colleagues was only available through an extremely slow and sometimes unreliable exchange of letters.

An outline of some of the political and economic events of the period is given only to background the many issues which fell to the justices to determine to establish an in-depth examination of a large number of representative opinions and to show how vital the circuit work of these four justices was in the shaping of United States law in those very early years.

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Note: author names only include an initial or forename if needed for disambiguation. Chief justices, justices, district and probate judges are distinguished by 'CJ', 'J', 'DJ' and 'PJ'. Other names have initial or first name with an indication of office as appropriate. Law Reports listed at pp 207–8 are indexed under 'law reports (as listed at pp 207–8)' rather than under the reporter. References are included in the index only when something of substance is said about the reports or the reporter.

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