

# HARVARD LAW REVIEW

## THE GENERAL COMMON LAW AND SECTION 34 OF THE JUDICIARY ACT OF 1789: THE EXAMPLE OF MARINE INSURANCE

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*In Swift v. Tyson, the Supreme Court held that section 34 of the Judiciary Act of 1789 did not require a federal court in a commercial case to apply the rule followed by the courts of the state in which it sat. Instead, a federal court was free in such a case to follow the general law merchant. Legal historians have judged this holding a radical departure from earlier understandings of section 34. In this Article, Professor Fletcher demonstrates that the holding in Swift was largely a restatement of settled law. In the early nineteenth century, section 34 was regarded as the partial embodiment of the general principle of lex loci, which required courts to follow local law in cases where it applied. Section 34 and the lex loci principle were never thought to prevent a federal court from following the general common law in cases where it applied. Professor Fletcher uses as his example the law of marine insurance from about 1800 to 1820. During those years, state and federal courts succeeded in creating a stable, uniform system of common law that the federal courts applied without any hint that section 34 might require otherwise. The analysis of marine insurance cases suggests that we revise our historical judgment of Swift: these cases show that, long before Swift, there was a broad consensus that it was proper for federal courts sitting in diversity to apply the general common law in adjudicating commercial disputes.*

IN 1842, the Supreme Court held in *Swift v. Tyson*<sup>1</sup> that it was not bound by section 34 of the Judiciary Act of 1789<sup>2</sup> to follow state court decisions on matters of general commercial law. The conventional wisdom of modern legal scholarship is that this decision marked a sudden and dramatic change from prior practice.<sup>3</sup> Yet for all the

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<sup>1</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>2</sup> 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (1982)).

<sup>3</sup> Legal scholars as dissimilar in other respects as Professor Grant Gilmore and Professor Morton Horowitz hold versions of this modern view. To Professor Gilmore, Justice Story's

importance we attach to it today, *Swift* appears to have been regarded when it was decided as little more than a decision on the law of negotiable instruments concerning the availability of defenses to a remote endorsee who had taken a bill of exchange in payment of a preexisting debt. The Court was unanimous on the part of its decision involving section 34,<sup>4</sup> and the portion of Justice Story's opinion devoted to that issue is relatively short. Perhaps the single most revealing piece of evidence is that William Wetmore Story's biography of his father published in 1851 — in which he recounts at length all the great cases decided by Story — does not so much as mention *Swift*.<sup>5</sup>

In this Article, I show that the early understanding of section 34 was closer to the holding in *Swift* than is currently supposed. Section 34 required that federal courts follow state law, providing "[t]hat the laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."<sup>6</sup> But lawyers and judges in the early nineteenth century did not categorize all nonfederal law as state law within the meaning of section 34. There was a "local" state law, to which the section applied, and a "general" law, to which it did not. The specific command of section 34 was relatively narrow: federal courts in trials at common law were required to follow local state law in cases where it applied. Section 34 was also the partial embodiment of a larger *lex loci* principle under which the federal courts — whether sitting in common law, in equity, or even in admiralty — followed local law in all cases to which it applied. But the *lex loci* principle, like section 34 itself, had no application to questions of general law.

In a famous article published in this *Review* in 1923<sup>7</sup> and relied on by the Supreme Court in *Erie Railroad v. Tompkins*,<sup>8</sup> Charles Warren concluded that all nonfederal judge-made law was state law within the original meaning of section 34. This conclusion is too broad. Local common, or judge-made, law — which early nineteenth century Americans referred to simply as part of the "local law" —

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opinion in *Swift* was a "masterpiece of disingenuousness." G. GILMORE, *THE AGES OF AMERICAN LAW* 33 (1977). It "succeeded in reversing, for all practical purposes, the outcome of the constitutional debate which had allocated control of the substantive law to the states." *Id.* at 30. To Professor Horwitz, *Swift* is "[o]ne of the most interesting and puzzling developments in all of American legal history." M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 245 (1977).

<sup>4</sup> Justice Catron concurred in the result but contended that the Court had decided a point not presented by the record. He did not discuss section 34. See *Swift*, 41 U.S. (16 Pet.) at 23-24 (Catron, J., concurring in the judgment).

<sup>5</sup> See 1-2 W. STORY, *LIFE AND LETTERS OF JOSEPH STORY* (London 1851).

<sup>6</sup> 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (1982)).

<sup>7</sup> Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 84-88 (1923).

<sup>8</sup> 304 U.S. 64, 72-73 (1938).

clearly came within the command of the section. But general common law — which they referred to as the “common law”<sup>9</sup> — did not come within the scope either of section 34 or of the *lex loci* principle from which the section was derived. This general common law provided the rule of decision in the federal courts in all cases to which it applied, and no one thought section 34 required otherwise.

To illustrate the role of the general common law in the federal courts in the early nineteenth century, I rely on the nonjudicial writings of contemporary lawyers and judges and on a detailed analysis of marine insurance litigation under the general law merchant. Marine insurance cases provide the most successful example of the federal courts’ application of the general common law during this period. These cases not only constituted the single most important category of commercial litigation from about 1800 to 1820, but they also produced the most uniform — and therefore the most successful — system of commercial law in the American states. These materials show that, long before *Swift*, federal courts employed the general common law as an important part of their working jurisprudence. In marine insurance cases, they consistently followed the general common law and exercised their independent judgment on what that law required.

In *Swift*, the Supreme Court stated clearly for the first time that commercial law was, by definition, general law whether or not the state courts so regarded it. This meant that, after *Swift*, a state court in a commercial case could declare that it followed a local rule rather than the general common law but that a federal court sitting in that state would nevertheless follow the general common law. At least in retrospect, that statement makes *Swift* a significant landmark in nineteenth century law. The Supreme Court had never made such a statement in any marine insurance case before *Swift*.<sup>10</sup> No such statement had been necessary in those cases because the state and federal courts had been able to develop a uniform body of law despite the awkward structure of the American federal system and the potentially destructive impact of the *lex loci* principle. In marine insurance cases, deviations by individual state courts from the general law were sufficiently rare that these courts, even when they disagreed, considered themselves engaged in the joint endeavor of deciding cases under a general common law.

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<sup>9</sup> Despite the anachronism, I shall frequently refer to the common law as the “general common law.” To an early nineteenth century ear, the word “general” would have been a redundancy. I shall employ the modern phrase as a way of reminding modern readers that, in early nineteenth century usage, “common law” was a general common law shared by the American states rather than a local common law of a particular state.

<sup>10</sup> Justice Story did make such a statement on circuit in 1838, in *Robinson v. Commonwealth Ins. Co.*, 20 F. Cas. 1002, 1004 (C.C.D. Mass. 1838) (No. 11,949). It is discussed *infra* p. 1548.

One must look beyond the marine insurance cases to understand why the Court in *Swift* felt it necessary to formulate a rule so long left unstated and ambiguous. The explanation lies elsewhere, probably in substantial part in a study of negotiable instruments law, where the rules were not uniform among the states and where the Supreme Court had in fact followed local law in several cases.<sup>11</sup> But the concept of the general common law that is apparent in the marine insurance cases provided a critical intellectual foundation for *Swift*'s view of the general common law. And, perhaps equally important, the achievement of the marine insurance cases may help to explain the aspiration of the Court in *Swift*, for these cases may have suggested to the Court that the ideal of a uniform commercial law of negotiable instruments could be realized in practice.

### I. THE GENERAL COMMON LAW AND SECTION 34 OF THE JUDICIARY ACT OF 1789

The Judiciary Act of 1789 gave the United States circuit courts original jurisdiction over civil suits between parties of diverse citizenship.<sup>12</sup> With the possible exception of the admiralty jurisdiction exercised by the district courts,<sup>13</sup> this jurisdiction was the most important original jurisdiction given to the inferior federal courts. Yet the Judiciary Act was largely silent about the law that was to be followed in diversity cases. The only part of the Act that spoke to the issue was section 34,<sup>14</sup> which declared that state laws should provide the rules of decision "in cases where they apply." But section 34 did not specify the cases in which the application of state law would be appropriate. Nor did the section indicate what law should be applied in cases, if any, in which state laws did not apply and in which federal law did not "require or provide" anything.

In the discussion that follows, I show that the lawyers and judges of the early nineteenth century understood the "laws of the several

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<sup>11</sup> For existing studies of *Swift* and the commercial context of negotiable instruments law, see T. FREYER, *FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY* (1979); T. FREYER, *HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM* (1981). For a broader study of the relationship between the American law and the commercial order during this period see M. HORWITZ, *supra* note 3, at 140-252. For an interesting study of the common law and *Swift*, not limited to commercial cases, see R. BRIDWELL & R. WHITTEN, *THE CONSTITUTION AND THE COMMON LAW* (1977).

<sup>12</sup> Judiciary Act of 1789, § 11, 1 Stat. 73, 78 (partially codified as amended at 28 U.S.C. § 1332 (1982)).

<sup>13</sup> *Id.* § 9, 1 Stat. 73, 76 (partially codified as amended at 28 U.S.C. § 1333 (1982)).

<sup>14</sup> The full text of section 34 provided: "And be it further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. 73, 92. Section 34 is known in its modern incarnation as the Rules of Decision Act, 28 U.S.C. § 1652 (1982).

states" in section 34 to refer only to what was called "local" law. Cases to which the "local" law did not apply were governed by some other law. Sometimes this was federal law, referred to in section 34 as the "Constitution, treaties, or statutes of the United States." But frequently neither federal nor local law applied. In such cases, depending on the nature of the dispute, a number of different kinds of law could provide the relevant rules of decision. The general common law was by far the most important of these nonlocal and nonfederal laws. That it was not explicitly referred to in section 34 does not prove that it was not expected to be applied. Rather, the fact that it was not mentioned probably suggests quite the opposite — that its applicability was so obvious as to go without saying.

*A. The General Common Law as the Rule of Decision  
in the Federal Courts*

1. *The Nature of the General Common Law.* — A modern reader may find it hard to understand the concept of general law employed by early nineteenth century lawyers and judges. The underlying premise was that the general law was not attached to any particular sovereign; rather, it existed by common practice and consent among a number of sovereigns. The group of relevant participants in the law-making and law-determining process varied depending on the category of general law at issue. The English common law was the law that prevailed in a single sovereignty, England. The law merchant, usually described as part of the common law, was the general law governing transactions among merchants in most of the trading nations in the world. The maritime law was an even more comprehensive and eclectic general law than the law merchant. The American courts resorted to this general body of preexisting law to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign.

Schooled as we are in the aphorisms of Justice Holmes, we may have difficulty recognizing how time- and culture-bound is the positivism of his famous objection to the Court's decision in *Southern Pacific Co. v. Jensen*: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified."<sup>15</sup> A hundred years earlier, Peter S. Du Ponceau had envisioned the common law quite differently. In his *Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States*, he wrote:

[Before the Revolution, the common law] was a general system of jurisprudence, constantly hovering over the local legislation and filling up its interstices. It was ready to pour in at every opening that it

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<sup>15</sup> 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

could find. Like the sun under a cloud, it was overshadowed, not extinguished, by the local laws . . . . It burst in at the moment of the adoption of the Constitution of the United States, and filled up every space which the State laws ceased to occupy.<sup>16</sup>

The *North American Review*, reviewing Du Ponceau's *Dissertation*, had even singled out this "glowing passage" for special comment: "[We agree with] Mr. Du Ponceau, respecting the existence of a common law for this country . . . . We admit it was an element floating, if he pleases, in the atmosphere. We regard it still as a vast reservoir of valuable jurisprudence."<sup>17</sup>

During the first part of the nineteenth century, the federal courts often used the general law to supply the rule of decision. It was applied in a wide variety of cases, but most frequently and consistently in commercial cases.<sup>18</sup> As an article of faith, and as a matter of substantial truth, jurisprudential writers from the middle of the eighteenth through the early nineteenth century reiterated that commercial transactions in all civilized trading countries were governed by a uniform set of commercial laws. For example, William Blackstone, a preeminently faithful reporter of the opinions of his time, referred to the law merchant in 1769 as a "great universal law," "regularly and constantly adhered to."<sup>19</sup>

The concept of a uniform law merchant was quite naturally imported into the treatment of commercial law by American courts. Justice James Wilson, in his Lectures on Law delivered in 1790 and 1791 in Philadelphia, referred to the law merchant as having "been admitted to decide controversies concerning bills of exchange, policies of insurance, and other mercantile transactions, both where citizens of different states, and where citizens of the same state only, have been interested in the event."<sup>20</sup> And he recited the ideal that "[i]n commercial cases, all nations ought to have their laws conformable to each other."<sup>21</sup> The former chief justice of the Massachusetts Supreme

<sup>16</sup> P. DU PONCEAU, A DISSERTATION ON THE NATURE AND EXTENT OF THE JURISDICTION OF THE COURTS OF THE UNITED STATES 88 (Philadelphia 1824).

<sup>17</sup> Davies, Book Review, 21 N. AM. REV. 104, 134, 139 (1825).

In 1832, James Kent noted with pleasure that all the American states had received the English common law into their jurisprudence:

[T]he common law, as far as it is applicable to our situation and government, has been recognised and adopted, as one entire system, by the constitutions of Massachusetts, New-York, New-Jersey, and Maryland. It has been assumed, or declared by statute, with the like modifications, as the law of the land in every state.

1 J. KENT, COMMENTARIES ON AMERICAN LAW 472-73 (2d ed. New York 1832) (1st ed. New York 1826) (footnote omitted).

<sup>18</sup> See Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 2), 101 U. PA. L. REV. 792, 795-98, 803-06 (1953).

<sup>19</sup> 4 W. BLACKSTONE, COMMENTARIES \*67.

<sup>20</sup> 1 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 374-75 (B. Wilson ed. 1804) (footnote omitted).

<sup>21</sup> *Id.* at 375 n.1.

Judicial Court, James Sullivan, in his 1801 treatise, *The History of Land Titles in Massachusetts*, wrote that the law of contracts depended on the "*jus gentium* (the general law of nations) for [its] origin and [its] expositions, rather than on any municipal regulations of particular countries."<sup>22</sup> Zephaniah Swift, justice and later chief justice of the Connecticut Supreme Court, wrote in his 1810 digest of the law of evidence and treatise on negotiable instruments, "In questions of commercial law, the decisions of Courts, in all civilized, and commercial nations, are to be regarded, for the purpose of establishing uniform principles in the commercial world."<sup>23</sup> And in the same volume, Swift wrote — somewhat optimistically, in light of the unsettled nature of some aspects of the law of negotiable instruments — that the law of bills "constitute[s] a branch of universal commercial law, to be governed by the customs and usages of nations, and not by municipal law."<sup>24</sup>

All American courts, state and federal, relied on the general law merchant in commercial cases. For example, in 1805 Chief Justice James Kent of the New York Supreme Court decided a question of the law merchant on the analogy "between this case, and those decided in this court, and in England; on the ground of the foreign decisions, in a case appertaining to the commercial law of nations, and on the reason of the case."<sup>25</sup> Justice Samuel Sewall of the Massachusetts Supreme Judicial Court, in deciding a marine insurance case in 1807, wrote, "The general rules of law, applicable to this question, are expressed by Lord Mansfield . . . . These rules of the law merchant, adopted by the common law; are entirely conformable to the principles stated and explained by foreign jurists."<sup>26</sup> Justice Swift of Connecticut wrote in an 1810 marine insurance case, "As we are a commercial people, we have, with great propriety, adopted the law of merchants common to all commercial countries."<sup>27</sup> Justice William Paterson of the United States Supreme Court, writing in *Marine Insurance Co. v. Tucker* in 1806, applied a rule of the general law merchant, saying, "It has grown up into a clear, known, and certain rule, for the regulation of commercial negotiations, and is incorporated into the law merchant of the land."<sup>28</sup> In 1801, the United States circuit court in Philadelphia in a marine insurance case, *Bentaloe v. Pratt*, referred to the law merchant as "the common or general law."<sup>29</sup>

<sup>22</sup> J. SULLIVAN, *THE HISTORY OF LAND TITLES IN MASSACHUSETTS* 337-38 (Boston 1801). For a general biography of Sullivan, see T. AMORY, *LIFE OF JAMES SULLIVAN* (Boston 1859).

<sup>23</sup> Z. SWIFT, *A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES. AND A TREATISE ON BILLS OF EXCHANGE, AND PROMISSORY NOTES* at ix (Hartford 1810).

<sup>24</sup> *Id.* at 245.

<sup>25</sup> *Walden v. Le Roy*, 2 Cai. R. 263, 266 (N.Y. Sup. Ct. 1805).

<sup>26</sup> *Taylor v. Lowell*, 3 Mass. 331, 343 (1807) (footnote omitted).

<sup>27</sup> *Brown v. Union Ins. Co.*, 4 Day 179, 188 (Conn. 1810).

<sup>28</sup> 7 U.S. (3 Cranch) 357, 393 (1806).

<sup>29</sup> 3 F. Cas. 241, 243 (C.C.E.D. Pa. 1801) (No. 1330).

The sense of adhering to and applying a "universal law" of commercial transactions persisted, to some degree, throughout the first half of the nineteenth century; but as early as 1810, it began to be supplanted by the notion of a uniquely American common law. By the 1820's, a new pride in American law had emerged<sup>30</sup> and American lawyers began to speak fairly regularly of a distinctly American law merchant, different in significant respects from the international law merchant. J.M. Condry noted in 1810 that the United States' status as a neutral power meant that "no European work could be expected to exhibit to the American lawyer, or merchant, an adequate view of that branch of the law, as applied to the business and concerns of his own country."<sup>31</sup> And in a similar vein, the *North American Review* in 1823 noted that "we may pride ourselves upon the improvements, which we have made in this country," upon the English common law.<sup>32</sup>

This modified law merchant was still regarded as a general American common law rather than as the local law of any particular state. In 1825, Joseph Story wrote in the *North American Review* that he recommended "to our brethren of the English bar, if perchance these pages should attract their notice, the study of American jurisprudence. Of course we do not mean of our local laws and peculiar systems . . . . What we do recommend is the study of our commercial adjudications."<sup>33</sup> James Kent, in outlining the plan for his *Commentaries* in a letter to Peter S. Du Ponceau in 1826, wrote that he wished to deal with the general common law:

My object will be to discuss the law . . . as known and received at Boston, New York, Philadelphia, Baltimore, Charleston &c. and as proved by the judicial decisions in those respective states. I shall not much care what the law is in Vermont or Delaware or Rhode Island, or many other states. Cannot we assume American common law to be what is declared in the federal courts and in the courts of the states I have mentioned and in some others, without troubling ourselves with every local peculiarity?<sup>34</sup>

Nathan Dane of Massachusetts had much the same ambition for his massive eight-volume *General Abridgement and Digest of American Law*, published in 1823 and 1824: "Though it has not been practicable to include in [this work] *local State law*, on a large scale, except as

<sup>30</sup> See P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 99-265 (1965). Dean Pound's study of this period is still a very helpful treatment of the forces that shaped American law. See R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

<sup>31</sup> I S. MARSHALL, *A TREATISE ON THE LAW OF INSURANCE* at v (J. Condry ed. 1810) (1st ed. London 1802).

<sup>32</sup> Cushing, Book Review, 17 N. AM. REV. 69, 72 (1823).

<sup>33</sup> Story, Book Review, 20 N. AM. REV. 47, 67-68 (1825).

<sup>34</sup> Letter from James Kent to Peter S. Du Ponceau (Dec. 29, 1826), *quoted in* M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY*, 1776-1876, at 361 n.55 (1976).



to two States, yet there is included in it enough of such State law, to shew that the several State courts proceed on the same *general* authorities in deciding general questions."<sup>35</sup>

Behind these statements about the glories of the general American common law and of the American law merchant lay a slightly less glorious reality. The common law had never been perfectly uniform among the states and was growing less so. By the 1820's, many people had come to view the increasing divergence of the states' law with alarm,<sup>36</sup> and works like Kent's and Dane's that emphasized the uniformity of American law were intended to provide a unifying counterforce against the centrifugal forces exerted by the various states. But there had always been, and still remained, a substantial core of uniform law that was administered by the federal and state courts as a general American common law.

2. *The Federal Common Law, the Federal Common Law of Crimes, and the General Common Law.* — In the years following the passage of the Judiciary Act of 1789, several difficult questions about the function of the federal judiciary remained to be answered. Two questions about the role of the common law in the federal courts were particularly important. The first question was whether the general common law was intended to be federal law (a law of the United States in its national capacity) or merely the general law of the American states (a law providing the rule of decision in cases to which it applied). The second question was whether the United States could bring criminal suits in the federal courts on the basis of the general common law of crimes, or whether federal criminal statutes were necessary to such prosecutions. Both questions were eventually answered in ways that restricted the power of the federal courts: the general common law was held not to be federal common law, and the general common law of crimes was held not to constitute a federal criminal law enforceable in federal court. But as the debates over these two questions show, it was assumed that the noncriminal general common law necessarily provided the rules of decision in the federal courts in all cases to which it applied.

(a) *The Distinction Between the General Common Law and the Federal Common Law.* — In 1790, a year after the passage of the Judiciary Act, Attorney General Edmund Randolph prepared a report for the United States House of Representatives in which he described the judiciary system created by the Act and recommended measures for its improvement.<sup>37</sup> Randolph explained why the common law was

<sup>35</sup> 1 N. DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW at v (Boston 1823).

<sup>36</sup> See *infra* pp. 1558–62.

<sup>37</sup> E. RANDOLPH, JUDICIARY SYSTEM, H.R. DOC. NO. 17, 1st Cong., 3d Sess. (1790), reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 21 (W. Lowrie & W. Franklin eds. 1834).

not mentioned in section 34: "It is conjectured that the common law was omitted among the rules of decision, as having been already the law of the United States. Most probably this will seldom, if ever, be controverted."<sup>38</sup> Randolph was concerned, however, that this be made explicit, and he proposed the following addition to the section: "and, moreover, that the common law, so far as the same be not altered by the supreme law, by the laws of particular States, or by statutes, shall also be a rule of decision."<sup>39</sup> Although Randolph's proposal was never adopted,<sup>40</sup> the text of the amendment and Randolph's accompanying explanation provide some insight into the problems inherent in the distinction between a federal and a general common law.

There is some ambiguity in Randolph's phrase "already the law of the United States." Did he mean that the common law was the law of the United States in its national capacity — that is, supreme federal law — rather than merely the common law of the American states employed by the national courts? Randolph's proffered justification for his amendment suggests that he may have intended the common law to be a genuine national law:

But in one aspect the existence of the common law, as the law of the United States, is equivocal. For if the doctrines of the common law can be introduced into the federal courts only by recurring to them for the explanation of the language used in the laws of the United States and of particular States, or by the connexion which the common law will have with most of the suits in the federal courts, as arising within some particular State, some parts of the common law which do not fall within either of these characters will be estranged from our system.<sup>41</sup>

This passage suggests that Randolph may have been proposing that Congress explicitly adopt, as a national or federal common law, even

<sup>38</sup> *Id.*, reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 37, at 25.

<sup>39</sup> *Id.*, reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 37, at 33. This proposed amendment to section 34 of the Judiciary Act is not described in the modern scholarly literature on the subject. Professors Frankfurter and Landis were aware of Randolph's report and indeed discuss the part of the report in which Randolph analyzes the burdensome requirements of circuit-riding under the 1789 Act. See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 14–20 (1928). Charles Warren mentions only a single passage in Randolph's report that states that federal law "will particularly control the laws of the several States whether consisting of their own original legislation, the common law, or the statute law, expressly or tacitly adopted." Warren, *supra* note 7, at 88 n.84 (quoting E. RANDOLPH, *supra* note 37, reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 37, at 36 n.26).

<sup>40</sup> Professor Goebel recounts that the entire report was "merely referred [by the House] to the Committee of the Whole, where it rested in peace." J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 542 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States No. 1, 1971).

<sup>41</sup> E. RANDOLPH, *supra* note 37, reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 37, at 25.

those common law rules that federal courts would not have applied in the course of adjudicating disputes within their limited jurisdiction. Randolph may even have been arguing for federal jurisdiction over all cases governed by the common law. But if this is what he had in mind, his proposed method was probably insufficient to accomplish his purposes. Randolph's proposed amendment allowed the common law to apply only to questions presented in cases already in the federal courts. Moreover, and most important, the text of the proposed addition makes it fairly clear that the common law was not supreme law in the ordinary sense of the supremacy clause, for the proposal provided that the common law should be the rule of decision only "so far as the same be not altered . . . by the laws of particular States."<sup>42</sup>

Analytical difficulties in distinguishing between a supreme federal common law and the general common law are not altogether surprising in the years immediately following the adoption of the Judiciary Act, and Randolph's ambiguous treatment of the two notions of common law may have been due to his failure to distinguish them clearly in his own mind.<sup>43</sup> The ambiguity of his treatment suggests two possible explanations for Congress' rejection of his proposal. If members of Congress perceived the proposal as an attempt to establish a federal common law, their failure to adopt it is easily understandable, for there was sharp disagreement about the existence of a federal common law. In the alternative, if the proposal was merely designed to codify the proposition that the general common law should provide the rule of decision in cases where it applied, Congress' failure to enact the proposal is also understandable. In that case, Randolph's proposed revision would only have articulated what was already obvious to everyone.

The analysis of Randolph's fellow Virginian, St. George Tucker, further demonstrates that the general common law was assumed to provide the rule of decision in cases where it applied. Tucker held this view notwithstanding his belief that such general common law was not a supreme federal law. In a long appendix to his edition of Blackstone published in 1803, Tucker argued vigorously that there was no national common law in the sense of a supreme national law.<sup>44</sup> He noted that Supreme Court Justices Oliver Ellsworth and Bushrod Washington, among others, considered the common law of England

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<sup>42</sup> *Id.*, reprinted in 1 AMERICAN STATE PAPERS: MISCELLANEOUS, *supra* note 37, at 33.

<sup>43</sup> See Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1055-57 (1983); cf. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 428 (1793) (in oral argument, Randolph was apparently unwilling to admit or perhaps unable to see the distinction between a general common law action of assumpsit and an action based on federal law).

<sup>44</sup> Tucker, *Appendix to 1 W. BLACKSTONE, COMMENTARIES* at note E (S. Tucker ed. & comm. 1803).

to be the "unwritten law of the United States, in their national or federal capacity," and that the issue had been raised in the House of Representatives.<sup>45</sup> Arguing against this view of the common law, Tucker contended that, if it were adopted, the jurisdiction of the federal courts and the powers of the federal government would be unlimited:

This question is of very great importance, not only as it regards the limits of the jurisdiction of the *federal courts*; but also, as it relates to the extent of the powers vested in the *federal government*. For, if it be true that the common law of England, has been adopted by the United States in their national, or federal capacity, the jurisdiction of the *federal courts* must be co-extensive with it; or, in other words, *unlimited*: so also, must be the jurisdiction, and authority of the *other branches* of the federal government; that is to say, their powers respectively must be, likewise, *unlimited*.<sup>46</sup>

But despite his argument against a *federal* common law, Tucker considered it appropriate — indeed, inescapable — that the federal courts should follow the general law, including English common law, in cases where it applied. As he saw it, the United States circuit courts sitting in diversity should decide cases in the same way state courts would decide them — by applying whatever law was appropriate to those cases. The modern reader may be surprised by the many sources of law Tucker had in mind:

In short, as the matters cognizable in the federal courts, belong . . . partly to the law of nations, partly to the common law of England; partly to the civil law; partly to the maritime law, comprehending the laws of Oleron and Rhodes; and partly to the general law and custom of merchants; and partly to the municipal laws of any foreign nation, or of any state in the union, where the cause of action may happen to arise, or where the suit may be instituted; so, the law of nations, the common law of England, the civil law, the law maritime, the law merchant, or the *lex loci*, or law of the foreign nation, or state, in which the cause of action may arise, or shall be decided, must in their turn be resorted to as the rule of decision, according to the nature and circumstances of each case, respectively.<sup>47</sup>

In other words, there were not only two categories of law, state and federal. There were also a number of categories that could be included under the term "general law," many of which were incorporated into the general common law of the American states. For Tucker, the notion of a federal common law was thus quite distinct from that of a general common law. The existence of the first was a matter of

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<sup>45</sup> *Id.* at 379–80. It is unclear whether Tucker, in his reference to the House of Representatives, had in mind Randolph's 1790 report to the House.

<sup>46</sup> *Id.* at 380 (emphasis in original).

<sup>47</sup> *Id.* at 430; see *id.* at 421.

deep dispute,<sup>48</sup> but the existence of the second was assumed. Most important, the obligation of the federal courts to apply the general law in appropriate cases was taken for granted even by those, like Tucker, who wished to limit the power of the national government.

(b) *The Distinction Between the General Common Law and the Federal Common Law of Crimes.* — The dispute about the federal common law of crimes also illuminates early nineteenth century assumptions about the general common law. Reduced to its simplest terms, the question was whether the United States could prosecute crimes under the general common law of crimes or whether a federal statute declaring the conduct criminal was necessary for such prosecutions. Although it appears that the early sentiment of the Supreme Court was in favor of a federal common law of crimes, the issue was eventually settled the other way.<sup>49</sup> But it is clear from the terms of the dispute about the federal common law of crimes that there was never any question about the existence of a general noncriminal common law or the ability of the federal courts to apply it.

From the beginning, a clear distinction was drawn between a federal common law of crimes and a general noncriminal law. An early example is a pair of cases decided in 1789 by District Judge Richard Peters and Supreme Court Justice Samuel Chase, sitting together as members of the United States Circuit Court for the Third Circuit. The first case, *United States v. Worrall*,<sup>50</sup> was a criminal case in which the two judges disagreed: Peters thought there was a federal common law of crimes; Chase thought there was not. But the very next case they decided on the merits was a negotiable instrument case in which Judge Peters and Justice Chase were in perfect agreement on the existence of a general noncriminal common law.<sup>51</sup> They

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<sup>48</sup> In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 498 (1834), the Supreme Court finally decided the issue. In holding that there was no federal common law of copyright, Justice McLean wrote for the Court:

It is clear, there can be no common law of the United States . . . . There is no principle which pervades the Union and has the authority of law, that is not embodied in the constitution or laws of the Union. The common law could be made a part of our federal system, only by legislative adoption.

*Id.* at 554.

<sup>49</sup> See *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); See J. GOODENOW, *HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE* 283-314 (Steubenville, Ohio, 1819 & photo. reprint 1972) (arguing against a federal common law of crimes); P. DU PONCEAU, *supra* note 16, at 33 (arguing in favor of a federal common law of crimes).

For helpful histories of this dispute, see R. BRIDWELL & R. WHITTEN, *supra* note 11, at 35-51; J. GOEBEL, *supra* note 40, at 623-51; J. MCCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 170-80 (1971); 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 433-42 (1926); Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 NW. U.L. REV. 26, 46-72 (1978).

<sup>50</sup> 2 U.S. (2 Dall.) 384 (1798).

<sup>51</sup> See *Wilkinson v. Nicklin*, 2 U.S. (2 Dall.) 396 (1798).

decided the case on general principles of law,<sup>52</sup> and neither man questioned the propriety of deciding on that basis.<sup>53</sup>

Peter S. Du Ponceau, an advocate of a federal common law of crimes,<sup>54</sup> also distinguished the general common law from any proposal for a federal common law of crimes. Du Ponceau took as a premise for his argument in favor of a federal common law of crimes the proposition that the general common law was applicable in civil cases. But he agreed with Tucker that the general common law was not national law. To make this point, Du Ponceau argued in his 1824 *Dissertation* that it was critically important to distinguish "between the common law as a *source* of power and as a *means* for its exercise" in the national courts.<sup>55</sup> In other words, the common law did not provide jurisdiction to the national courts under the "arising under" clause of article III, and it could not be derived from the lawmaking powers of the national government. But the general common law could be used — indeed, had to be used — by the national courts in the exercise of jurisdiction based on other grounds: for example, civil jurisdiction based on diversity or criminal jurisdiction based on the United States' status as party to the suit.

By 1824, Du Ponceau's argument in favor of a federal common law of crimes was a lost cause. But the existence of the general noncriminal common law that he used as the foundation for his argument was beyond question. As he stated it, "[W]henever by the Constitution or the laws made in pursuance of it, jurisdiction is given to [the federal courts] either over the person or subject matter, they are bound to take the common law as their rule of decision whenever other laws, national or local, are not applicable."<sup>56</sup> In other words,

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<sup>52</sup> Neither Justice Chase nor Judge Peters referred to federal or state law. Justice Chase wrote: "The defence cannot be admitted. There is no rule more perfectly established, there is none which ought to be held more sacred in commercial transactions, than that the blank endorsement of a bill of exchange passes all the interest in the bill . . . ." *Id.* at 398 (opinion of Chase, J.). Judge Peters wrote: "the rule of law is so well established, and, upon general principles, is so beneficial, that I cannot persuade myself, in any degree, to dispense with its operation." *Id.* (opinion of Peters, J.).

<sup>53</sup> Judge Peters emphasized the indispensability of the general (noncriminal) common law to the functioning of the federal courts in an admiralty opinion in the district court, *Gardner v. The New Jersey*, 92 F. Cas. 1192 (D. Pa. 1806) (No. 5233). In applying the general maritime law to a libel for seamen's wages, he wrote:

I do not mean to enter into any controversy, as to what parts, or in what cases, the common law is obligatory and directory in the courts of the United States, having on these subjects often declared my opinion. Whatever difference of sentiment there may exist, . . . it must be indisputably known, to all who are well informed, that without the rules and provisions as settled and made by the common law, the courts would be inoperative.

*Id.* at 1194 n.3.

<sup>54</sup> See P. DU PONCEAU, *supra* note 16, at 32–33.

<sup>55</sup> *Id.* at xiv.

<sup>56</sup> *Id.* at 101; *cf. id.* at 90 ("In civil cases, the common law is resorted to by general consent, and the Judges have not experienced more than common difficulties in the execution of their duty.").

the common law provided the rule of decision in cases to which it applied, just as national law and local law provided the rule of decision in cases to which they applied. It is against this background that section 34 of the Judiciary Act of 1789 must be understood.

*B. The Limitation of the Command of Section 34  
of the Judiciary Act to Local Law*

Section 34 was apparently added to the Judiciary Act as an afterthought.<sup>57</sup> After a change of wording — made famous in this century by Charles Warren<sup>58</sup> — it appears to have become law without serious debate. In its final form, it required that the “laws of the several states . . . shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”<sup>59</sup> Early nineteenth century lawyers and judges shared a core understanding of the scope and meaning of this section. Although their views were complex and to some degree indeterminate, it is possible to state three basic propositions about their understanding of the section.

First, section 34 was generally understood to be merely declaratory of existing law; that is, even if the section had never been enacted, the federal courts would have followed the local law of the states in cases where it applied. This understanding is revealed not only in repeated statements that section 34 was merely an expression of the general principle of *lex loci*, but also in the federal courts’ practice of following local state law in equity and admiralty cases, to which section 34 did not apply. Second, the local state law that the federal courts were bound to follow under the *lex loci* principle could be established either by state statute or by state judicial decision. Third, state courts and legislatures could, at least in theory, establish local law that federal courts would be obliged to follow in any area of law. In practice, however, federal courts usually felt obliged to comply with state law only in subject areas of peculiarly local concern, such

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<sup>57</sup> Professor Goebel’s narrative of the passage of the Act is particularly helpful. See J. GOEBEL, *supra* note 40, at 457–508. Charles Warren’s narratives are also useful. See C. WARREN, *supra* note 49, at 8–14; Warren, *supra* note 7, at 51–52, 81–90, 108.

<sup>58</sup> In the early 1920’s, Warren discovered a draft of the judiciary bill revealing that what later became section 34 had originally read:

*[T]he Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise, except where the constitution, Treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in the trials at common law in the courts of the United States in cases where they apply.*

Warren, *supra* note 7, at 86 (emphasis added). The italicized words were stricken and, in the version that became law, were replaced by the words “laws of the several states.” See *id.* at 86–87.

<sup>59</sup> Judiciary Act of 1789, § 34, 1 Stat. 73, 92.

as title to real property. Although federal courts sometimes found local law to be dispositive in matters of more national concern, such as commercial law, such cases were relatively rare.

1. *Section 34 as the Partial Embodiment of the Principle of Lex Loci.* — (a) *Section 34 as Merely Declaratory of the Lex Loci Principle.* — In the early nineteenth century, section 34 was understood to require only that local — or in the words of St. George Tucker, “municipal”<sup>60</sup> — state law be followed. The section was generally viewed as merely declaratory of the practice that would have existed in the absence of any statutory provision. Peter S. Du Ponceau wrote in his *Dissertation* that he could not “consider [the section] otherwise than as declaratory of what the law was before it was enacted.”<sup>61</sup> In his treatise on the Constitution, William Rawle wrote somewhat more cautiously that the section announced “a rule so convenient and appropriate, that it would probably have been adopted by the courts, if no act of congress had been passed on the subject.”<sup>62</sup> Justice William Johnson, the strongest advocate of states’ rights on the Supreme Court,<sup>63</sup> wrote for the Court in *Hawkins v. Barney’s Lessee* that section 34 “has been uniformly held to be no more than a declaration of what the law would have been without it: to wit, that the *lex loci* must be the governing rule of private right, under whatever jurisdiction private right comes to be examined.”<sup>64</sup>

The individual Justices, even when riding circuit and freer to speak their own minds, repeatedly said the same thing. Justice Bushrod Washington, sitting as circuit justice in *Golden v. Prince*<sup>65</sup> followed local Pennsylvania law “independent” of the requirement of section 34. He stated that he was led to this result by principles of the comity of nations:

The laws even of foreign countries where a contract is made, are by the comity of nations regarded every where as a rule of decision, in relation to that contract; and it would be strange if the laws of one state, in which a contract was made, should be disregarded in any other state of the Union as a rule of decision.<sup>66</sup>

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<sup>60</sup> Tucker, *supra* note 44, at 430.

<sup>61</sup> P. DU PONCEAU, *supra* note 16, at 37.

<sup>62</sup> W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 249 (Philadelphia 1825). Earlier in the treatise, Rawle had described diversity jurisdiction in terms consistent with those used by Tucker and Du Ponceau: “We cannot . . . otherwise understand the constitutional extension of jurisdiction in the cases described, than as a declaration that whatever relief would be afforded by other judicial tribunals in similar cases, shall be afforded by the courts of the United States . . .” *Id.* at 246.

<sup>63</sup> See generally D. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER (1954) (describing Justice Johnson’s political and judicial career).

<sup>64</sup> 30 U.S. (5 Pet.) 457, 464 (1831).

<sup>65</sup> 10 F. Cas. 542 (C.C.D. Pa. 1814) (No. 5509).

<sup>66</sup> *Id.* at 543.



Justice Joseph Story, sitting as circuit justice in *Ex parte Biddle*,<sup>67</sup> noted that

the laws of the states are expressly declared to be rules of decision in trials at common law in cases, where they apply. And the same doctrine must have been held without this express provision, and must now be implied in all suits, where the *lex loci* is to regulate the rights or remedies of parties.<sup>68</sup>

And Justice Johnson, sitting as circuit justice in *Holmes v. United States*,<sup>69</sup> wrote in much the same language he was to use for the entire Court two years later in *Hawkins*: "[Section 34] enacts nothing but what would have been law without it, to wit that: the *Lex loci*, should be the law of the courts of the U.S. distributed over the Union."<sup>70</sup>

(b) *The Lex Loci Principle in Equity*. — It was quite clear that section 34 itself did not require the federal courts to follow local state law when sitting in equity. Chief Justice Marshall, in a widely quoted comment, had remarked that he had always conceived "the technical term, 'trials at common law,'" of section 34 to apply "to suits at common law as contradistinguished from those which come before the court sitting as a court of equity or admiralty."<sup>71</sup> Yet as a routine matter, the federal courts sitting in equity followed local state law. In light of the underlying *lex loci* principle from which section 34 was derived, this is hardly surprising. In his treatise, Rawle suggested a likely explanation for Congress' failure to mention equity in section 34: because some states had no equity courts at all, "[a] construction that would adopt the state practice in all its extent would extinguish in some states the exercise of equitable jurisdiction altogether."<sup>72</sup> But

<sup>67</sup> 3 F. Cas. 336 (C.C.D. Mass. 1822) (No. 1391).

<sup>68</sup> *Id.* at 337.

<sup>69</sup> *The Gazette* (Charleston, S.C.), June 9, 1832, at 1, col. 1.

<sup>70</sup> *Id.*

<sup>71</sup> *United States v. Burr*, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694).

<sup>72</sup> W. RAWLE, *supra* note 62, at 248. The Supreme Court had already indicated that cases in law and equity would be treated similarly. See *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212 (1818). The Court first stated, in language that Rawle paraphrased in his treatise:

In some states in the Union, no court of chancery exists, to administer equitable relief. In some of those states, courts of law recognise and enforce, in suits at law, all the equitable claims and rights which a court of equity would recognise and enforce; in others, all relief is denied, and such equitable claims and rights are to be considered as mere nullities, at law. A construction, therefore, that would adopt the state practice, in all its extent, would at once extinguish, in such states, the exercise of equitable jurisdiction.

*Id.* at 222. The Court then went on to say that remedies in general were not to be governed by state practice: "The court, therefore, think, that to effectuate the purposes of the legislature, the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity . . ." *Id.* at 222-23. Justice Washington, on circuit in *Mayer v. Foulkrod*, 16 F. Cas. 1231 (C.C.E.D. Pa. 1823) (No. 9341), later interpreted *Campbell* to mean that questions of

Rawle considered the *lex loci* principle to apply to suits in equity. He found the rule laid down in section 34 "so convenient and appropriate" and "so justly applicable to cases in equity, that we may consider it likely to be adopted, whenever the necessity shall arise."<sup>73</sup>

An interesting example is *Van Reimsdyk v. Kane*,<sup>74</sup> decided by Justice Story on circuit in 1812. The suit had been brought in equity and was therefore not within the terms of section 34, but Story was at pains to explain why local law need not be followed in such a case.<sup>75</sup> In other words, Story felt obliged to deal with the *lex loci* issue at a level of general principle rather than merely to point out that the statute covered only suits at common law.<sup>76</sup> Other examples include the Supreme Court's decision in *Riddle & Co. v. Mandeville & Jameson*<sup>77</sup> in 1809, in which Chief Justice Marshall held for the Court that the remote endorsee of a promissory note who had been unsuccessful at law in the Supreme Court six years before<sup>78</sup> could successfully recover in equity "under the laws of Virginia."<sup>79</sup> A later example is *Bank of the United States v. Weisiger*<sup>80</sup> in 1829, in which the same question came up in an equity suit from Kentucky. Justice Johnson, writing for the Court, reached the same result as in *Riddle & Co. v. Mandeville & Jameson*, emphasizing that he was following state law: "This case turns altogether upon doctrines peculiar to the states of Virginia and Kentucky."<sup>81</sup>

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rights, both at law and in equity, would be determined according to local state law, whereas questions of remedies, both at law and in equity, would be determined according to federal court practice. See *id.* at 1234-35. Rawle had been counsel in both *Campbell* and *Foulkrod*.

<sup>73</sup> W. RAWLE, *supra* note 62, at 249.

<sup>74</sup> 28 F. Cas. 1062 (C.C.D.R.I. 1812) (No. 16,871).

<sup>75</sup> See *infra* note 117.

<sup>76</sup> The Supreme Court reversed Story's decision on an evidentiary point. See *Clarke's Executors v. Van Riemsdyk*, 13 U.S. (9 Cranch) 153 (1815). The opinion of the Court did not mention section 34. In other equity cases on circuit, Story followed local state law where appropriate. See, e.g., *Randall v. Phillips*, 20 F. Cas. 235, 237-38 (C.C.D.R.I. 1824) (No. 11,555) (construing a conveyance of real property to create a tenancy in common under Rhode Island law); *Gilman v. Brown*, 10 F. Cas. 392, 402 (C.C.D. Mass. 1817) (No. 5441) (construing a contract according to Massachusetts law).

<sup>77</sup> 9 U.S. (5 Cranch) 322 (1809).

<sup>78</sup> See *Mandeville & Jameson v. Riddle & Co.*, 5 U.S. (1 Cranch) 290 (1803).

<sup>79</sup> *Riddle & Co. v. Mandeville & Jameson*, 9 U.S. (5 Cranch) 322, 329 (1809).

<sup>80</sup> 27 U.S. (2 Pet.) 331 (1829).

<sup>81</sup> *Id.* at 347. Johnson mentioned Virginia law because Kentucky had separated from Virginia to become a state, and its law paralleled Virginia's in most respects.

Professor Horwitz maintains that the Court in *Weisiger* "ignored Kentucky's constantly reiterated rule against negotiability," M. HORWITZ, *supra* note 3, at 223, and that "Johnson acknowledged the Kentucky cases opposing the endorsee's action but pretended that they were simply holdings that there was no action at law," *id.* at 340 n.51. This reading seems doubtful. Of all the Justices, Johnson was the least likely to pretend that a local state law was consistent with the general law. I have discovered only two cases in which a Justice dissented on the ground that the Court was pretending that a state followed the general rule when, in fact, it followed its own local rule. In both cases, the dissenter was Johnson. See *Patterson v. Winn*,

(c) *The Lex Loci Principle in Admiralty.* — Notwithstanding the inapplicability of section 34 to admiralty, the *lex loci* principle also constrained the federal admiralty courts' choice of a rule of decision. Because of the character of most disputes in admiralty, few admiralty cases were governed by local law. But in those cases in which local law provided the relevant rule of decision, federal admiralty courts did not hesitate to follow it. For example, in *The Jerusalem*,<sup>82</sup> a case decided on circuit in 1814, Story wrote, "[When admiralty jurisdiction] rightfully attaches on the subject matter, [the federal court] will exercise it conformably with the law of nations, or the *lex loci contractus*, as the case may require."<sup>83</sup> Twelve years later on circuit, in *Hammond v. Essex Fire & Marine Insurance Co.*,<sup>84</sup> Story decided an admiralty libel by a ship's master for his wages only after referring to Massachusetts cases: "The cases cited at the bar fully support this doctrine; and what is more material, it has been recognised by the supreme court of Massachusetts, to which state these parties belong."<sup>85</sup>

2. *The Power of the States to Establish Local Law Binding on the Federal Courts Under the Lex Loci Principle.* — The *lex loci* principle from which section 34 was derived had a somewhat uncertain operational content in the early nineteenth century. The uncertainty was due in part to the undeveloped state of Anglo-American jurisprudence on choice of law questions. When Samuel Livermore wrote the first American conflict of laws treatise in 1828,<sup>86</sup> he commented:

It is not surprising, that we find no dissertations, or treatises, upon the personality, or reality of statutes, among the books of the common law of England. . . . One system has governed the whole . . . . Questions arising from the collision of opposite laws were therefore rarely presented to the courts of that nation, and did not furnish subjects for discussion.<sup>87</sup>

The uncertain content of the *lex loci* principle (and therefore the operation of section 34) was also due to the undeveloped state of American law governing the relationship of the national and state governments in the federal system. American federalism made choice of law questions both important and highly complex. As Joseph Story wrote in his great conflicts treatise in 1834:

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30 U.S. (5 Pet.) 233, 246 (1831) (Johnson, J., dissenting); *Willison v. Watkins*, 28 U.S. (3 Pet.) 43, 55 (1830) (Johnson, J., dissenting).

<sup>82</sup> 13 F. Cas. 559 (C.C.D. Mass. 1814) (No. 7293).

<sup>83</sup> *Id.* at 563.

<sup>84</sup> 11 F. Cas. 387 (C.C.D. Mass. 1826) (No. 6001).

<sup>85</sup> *Id.* at 389.

<sup>86</sup> S. LIVERMORE, DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS (New Orleans 1828).

<sup>87</sup> *Id.* at 12.

To no part of the world is [the jurisprudence of the conflict of laws] of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of those states . . . .<sup>88</sup>

The uncertainty regarding the *lex loci* principle had two aspects. First, the rules governing the application of inconsistent local state laws were unclear. Second, the dividing line between general law and local law was unclear. Both Livingston's and Story's conflicts treatises were addressed to the first of these issues.<sup>89</sup> But the second issue was equally if not more important, for it had significant consequences for the allocation of power between the state and federal governments. To the degree that a law was general rather than local, federal courts had equal status with state courts in its exposition and development. Indeed, given that the Supreme Court occupied a prominent and respected position and that the circuit courts sitting in all the states followed its rulings on matters of general common law, the federal courts were in a particularly favorable position to influence the development of the common law and to promote its nationwide uniformity. But to the degree that a law was local, the federal courts were required under the *lex loci* principle to follow a state's deviation from the general common law.

In the early nineteenth century, some general guidelines emerged for distinguishing between general and local law and for determining the extent of state power to create local law. Federal courts followed local law whether it deviated from the general common law by state statute or by judicial decision, and whether the courts were sitting at law or in equity. They regularly found that a law was local when the subject matter was of peculiarly local concern, such as title to real estate. And they usually followed general law when the subject matter was of national concern, as in commercial cases. Further, they only followed local laws whose existence and meaning were clearly established. Finally, they distinguished between questions of right, on

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<sup>88</sup> J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 9 (Boston 1834).

<sup>89</sup> Professor Horwitz finds a puzzling inconsistency between Story's conflicts treatise in 1834 and his opinion in *Swift* eight years later. He considers the treatise to reflect a "recognition of a fundamental erosion of the declaratory theory of law" and considers Story's opinion in *Swift* to be "a classic restatement of the declaratory theory." M. HORWITZ, *supra* note 3, at 247-48. Such an inconsistency is more apparent than real. To the degree that states followed local rather than general common law, a conflicts approach was necessary. To the degree that states followed the general common law, it was not. By limiting the power of the states to "localize" the common law, the Court in *Swift* tried to unify commercial law and thereby to reduce the necessity to resort to conflicts principles. But it is not at all clear that the theory behind *Swift* was "declaratory." As may be seen from the marine insurance cases discussed in this Article, *see, e.g., infra* pp. 1569-75, a general common law system could be based on a highly pragmatic and policy-oriented view of the law.

which they followed local state law, and questions of process<sup>90</sup> and remedy,<sup>91</sup> on which — absent other statutory requirements — they ordinarily did not. Aside from these general guidelines, however, the boundary between general and local law was indistinct, and the power of state courts to establish a local law was ambiguous.

(a) *State Deviation from the Common Law by Statute.* — The Supreme Court followed established state court interpretations of state statutes fairly consistently. As early as 1801, in *Wilson v. Mason*,<sup>92</sup> the Court indicated that it would consider itself bound by state interpretations of state statutes if it could discover them. But the Court, particularly in the early years, insisted that it would not defer to a state's judicial interpretation of its statutes unless it was clear and well settled. The Court's 1805 decision in *Huidekoper's Lessee v. Douglass*<sup>93</sup> provides the most extreme example of this insistence. The Pennsylvania Supreme Court had twice interpreted a state statute involving settlement of vacant land in a way favoring the state, but each time by a divided court.<sup>94</sup> A third suit was then brought under the same statute as a diversity action in Justice Washington's circuit court in Pennsylvania,<sup>95</sup> and the question of the statute's meaning was certified to the United States Supreme Court. The Court's interpretation of the statute differed from that of the Pennsylvania Supreme Court.<sup>96</sup> On remand to the circuit court, Justice Washington followed the United States Supreme Court's interpretation, noting that the question had been difficult and the law, at least to some degree, unsettled: "This question was so difficult, as to divide, not only this court, but the courts of this state."<sup>97</sup>

Later cases make clear what *Huidekoper's Lessee* may have left ambiguous: the Supreme Court and lower federal courts considered themselves bound to follow only well-established state court interpre-

<sup>90</sup> See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 24-26 (1825).

<sup>91</sup> See *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 222-23 (1818).

<sup>92</sup> 5 U.S. (1 Cranch) 45 (1801).

<sup>93</sup> 7 U.S. (3 Cranch) 1 (1805). But see 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 719-42 (1953) (contending that the United States Supreme Court interpreted the Pennsylvania statute at issue without regard to the decisions of the Pennsylvania state courts on the matter, and further, that the interpretation of the United States Supreme Court was supposed to be binding on the Pennsylvania courts).

<sup>94</sup> *Attorney Gen. v. Grantees*, 4 Dall. 237 (Pa. 1802); *Commonwealth v. Cox*, 4 Dall. 170 (Pa. 1800).

<sup>95</sup> *Huidekoper's Lessee v. Douglass*, 12 F. Cas. 847 (C.C.D. Pa. 1805) (No. 6851).

<sup>96</sup> See *Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1, 70-71 (1805).

<sup>97</sup> *Huidekoper's Lessee*, 12 F. Cas. at 847. The division of "this court" to which Justice Washington referred was the division of the circuit court rather than of the Supreme Court. The question had been taken up to the Supreme Court on a certificate of division of opinion of the judges of the circuit. See *Huidekoper's Lessee*, 7 U.S. (3 Cranch) at 1. The certification procedure was contained in the Judiciary Act of 1802, § 6, 2 Stat. 156, 159.

tations of state statutes. As Chief Justice Marshall said in following a state court interpretation of a state statute in *Thatcher v. Powell*:<sup>98</sup>

In construing the acts of the Legislature of a State, the decisions of the State tribunals have always governed this Court. In Tennessee, the question arising in this cause, after considerable discussion, seems to have been *finally settled on principles which are thought entirely correct*.<sup>99</sup>

And in *Green v. Lessee of Neal*,<sup>100</sup> the Supreme Court followed the Tennessee courts' changed interpretation of a Tennessee statute on the ground that the state court interpretation must control "where a question arises under a local law."<sup>101</sup> In language that may help explain the unwillingness of the Court to follow the Pennsylvania Supreme Court's interpretation in *Huidekoper's Lessee*, Justice John McLean pointedly noted that when the Court spoke of a state court interpretation, "reference is . . . made not to a single adjudication, but to a series of decisions which shall settle the rule."<sup>102</sup>

(b) *State Deviation from the Common Law by Judicial Decision.*

— State deviation from the general common law was most frequently accomplished by statute, but on those occasions when a state had clearly established its own judicial variation on the common law, the federal courts also followed that local law. An early example is *Mandeville & Jameson v. Riddle & Co.*<sup>103</sup> in 1803, in which the Supreme Court followed the Virginia common law rule forbidding a remote endorsee to sue on a promissory note, even though such a suit could have been brought under the general law merchant at the time. In a later case, *Jackson v. Chew*,<sup>104</sup> the Supreme Court in 1827 explicitly stated that it would follow state common law decisions, at least when they involved real property within the state: "This Court adopts the State decisions, because they settled the law applicable to the case; and the reasons assigned for this course, apply as well to

<sup>98</sup> 19 U.S. (6 Wheat.) 119 (1821).

<sup>99</sup> *Id.* at 127 (emphasis added).

<sup>100</sup> 31 U.S. (6 Pet.) 291 (1832).

<sup>101</sup> *Id.* at 298.

<sup>102</sup> *Id.* at 298–99.

<sup>103</sup> 5 U.S. (1 Cranch) 290 (1803). The laws of Virginia were in force in the County of Alexandria, where the case had been brought. See *Riddle v. Mandeville*, 20 F. Cas. 756 (C.C.D.C. 1802) (No. 11,807); Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103, 103–04 (1801) ("That the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of government . . ."). Professor Johnson recounts the litigation in *Riddle v. Mandeville* in G. HASKINS & H. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15*, at 560–66 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States No. 2, 1981).

<sup>104</sup> 25 U.S. (12 Wheat.) 153 (1827).

rules of construction growing out of the common law, as the statute law of the State, when applied to the title of lands."<sup>105</sup>

State common law rules, like state statutory interpretations, were required to be clear and well settled before a federal court would follow them. For example, in *Daly's Lessee v. James*,<sup>106</sup> the Court construed a will that had previously been interpreted by the Pennsylvania Supreme Court.<sup>107</sup> Writing for the Court, Justice Washington indicated that on "a question of so much doubt" the Court was inclined to "acquiesce" in the state court decision, but in the end he decided the case on another ground.<sup>108</sup> Dissenting on the merits, Justice Johnson described his obligation to defer to state court decisions:

As precedents entitled to high respect, the decisions of the state courts will always be considered; and in all cases of local law, we acknowledge an established and uniform course of decisions of the state courts, in the respective states, as the law of this court. . . . But a single decision on the construction of a will cannot be acknowledged as of binding efficacy, however it may be respected as a precedent.<sup>109</sup>

Two cases decided by Justice Story on circuit also illustrate federal court deference to local common law. In the first case, *Hatch v. White*,<sup>110</sup> the question was whether a creditor who had foreclosed on a mortgage could sue the mortgagee for a deficiency remaining after the foreclosure. The mortgage had been entered into and executed in Massachusetts, but the suit on the deficiency was brought in the circuit court in New Hampshire. Story indicated that he found the Massachusetts state law strongly persuasive:

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<sup>105</sup> *Id.* at 167. Thomas Sergeant, citing *Jackson v. Chew*, stated the general rule in the second edition of his treatise on constitutional law:

the courts of the United States are governed by the construction adopted by the state tribunals, when that construction is settled and ascertained. And the same rule has been extended to other cases, growing out of the common law, when applied to the title of lands, as for instance, in relation to the construction of a devise . . . . And this is considered indispensable to preserve uniformity in the decisions of the United States and state tribunals.

T. SERGEANT, CONSTITUTIONAL LAW 151 (2d ed. Philadelphia 1830) (1st ed. Philadelphia 1822). This passage is not contained in the first edition.

A similar rule is stated in *Hinde v. Lessee of Vattier*, 30 U.S. (5 Pet.) 398 (1831):

There is no principle better established, and more uniformly adhered to in this Court, than that the Circuit Courts, in deciding on titles to real property in the different states, are bound to decide precisely as the state Courts ought to do. The rules of property and of evidence, whether derived from the laws or adjudications of the judicial tribunals of a state, furnish the guides and rules of decision in those of the Union, in all cases to which they apply . . . .

*Id.* at 401 (citation omitted).

<sup>106</sup> 21 U.S. (8 Wheat.) 495 (1823).

<sup>107</sup> *Lessee of Smith v. Folwell*, 1 Binn. 546 (Pa. 1809).

<sup>108</sup> *Daly's Lessee*, 21 U.S. (8 Wheat.) at 535.

<sup>109</sup> *Id.* at 542 (Johnson, J., dissenting).

<sup>110</sup> 11 F. Cas. 810 (C.C.D.N.H. 1814) (No. 6209).

[T]his question has been solemnly adjudged in [Massachusetts], where this contract of mortgage was made and to be executed . . . . [This] may now be considered as the settled law of that state. Such an authority, even if not binding on this Court, is so conformable with principle and so highly respectable in itself, that it is not easy to shake its force.<sup>111</sup>

When the circuit court was sitting in New Hampshire, the law of Massachusetts was of persuasive value not only because it was properly "conformable" to general principle, but also because the law of the place of contracting should govern under proper choice of law principles. The second case, *Omalý v. Swan*,<sup>112</sup> decided on circuit in Massachusetts ten years later, presented the same legal issue. Now sitting in Massachusetts, the normally prolix Story wrote a four-sentence opinion following the Massachusetts rule: "This question has been long since settled by the local law . . . . It is too late now to controvert it."<sup>113</sup> When sitting in Massachusetts, Story regarded Massachusetts decisions as controlling, rather than merely persuasive, because the Massachusetts state courts had the power to establish local law binding on the federal circuit court sitting in that state.

3. *Distinguishing Between General and Local Subject Matter: The Area of Uncertainty.* — From the early 1800's through the 1830's, the federal courts followed established local law — both statutory and common law — in cases to which it applied.<sup>114</sup> They did so not merely because of the command of section 34 in suits at common law, but also in all categories of suits because of the underlying principle of *lex loci* from which section 34 was derived. But the contours of the *lex loci* principle were not as precisely defined during this period as they were to be in the years after 1842. There was always difficulty, for example, in determining whether the state law was settled with sufficient clarity to require the federal courts to follow state court

<sup>111</sup> *Id.* at 813 (citation omitted).

<sup>112</sup> 18 F. Cas. 689 (C.C.D. Mass. 1824) (No. 10,508). In addition, see Justice Story's opinion in *Gray v. Jenks*, 10 F. Cas. 1021 (C.C.D. Me. 1825) (No. 5720), in which he addressed the rights of a mortgagee to recover possession of real property under local law:

In the examination of this question the court must be governed altogether by the state jurisprudence, for it is purely a point of local law; and the doctrines of the common law, and the decision of the judicial tribunals of other states, are no farther to be used, than as they may illustrate what is obscure, and furnish analogies to guide in what is unsettled on this subject in our own jurisprudence.

*Id.* at 1022.

<sup>113</sup> *Omalý*, 18 F. Cas. at 690.

<sup>114</sup> As stated by counsel in *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838):

The 34th section of the judiciary act has been turned to, again and again, as showing that congress had furnished a rule of decision, as it is called, in cases at common law . . . . [T]he whole purpose of [the section] is to give efficacy to the local state laws, in trials at common law, in the courts of the United States . . . that is, that cases arising under a local law, shall be governed by that law.

*Id.* at 697.



decisions; and this difficulty was accentuated when judge-made rather than statutory state law was at issue. Moreover, it was sometimes unclear whether a state had established its own local version of the common law or had merely entertained a different idea of what the general common law required.

Most important, certain subject areas were presumed to be local. State court decisions in cases involving title to real property were considered to be conclusive. In cases such as *Green v. Lessee of Neal*,<sup>115</sup> the Supreme Court readily found that a state had established a clear local rule that a federal court was bound to follow. In cases involving areas of the law with local importance but not directly related to land titles and recording systems — for example, *Daly's Lessee v. James*,<sup>116</sup> involving the construction of a will — the Court showed moderate deference to state court decisions. Cases involving commercial law are more difficult to characterize. There appears to have been a presumption that such cases involved general rather than local law.<sup>117</sup> Yet in some negotiable instrument cases — among them,

<sup>115</sup> 31 U.S. (6 Pet.) 291, 299–301 (1832).

<sup>116</sup> 21 U.S. (8 Wheat.) 495 (1823); see also *Jackson v. Chew*, 25 U.S. (12 Wheat.) 153, 169 (1827) (following New York state court precedent in construing a New York will when “there have been two decisions in the two highest Courts of law in the State upon the identical question now in judgment, and which were in conformity to a settled course of adjudications for twenty years past”).

<sup>117</sup> Justice Story made it clear early in his career that he thought commercial cases constituted a special category for purposes of the *lex loci* principle. A year after he came on the bench, he decided *Van Reimsdyk v. Kane*, 28 F. Cas. 1062 (C.C.D.R.I. 1812) (No. 16,871), a case involving the question whether a Rhode Island insolvency statute could discharge a debt arising out of a contract entered into in a foreign country. In trying to establish a general framework for justifying his decision to disregard the Rhode Island statute, Story hypothesized an insurance case in which the right to recover under such a policy was “perfect” in the state where the contract was entered into, but was void or would receive a different construction because of “local ordinances” in the forum state. See *id.* at 1065. Story found it “difficult to admit” that such local law would be of “paramount authority” in the courts of the United States:

There must then be some limitation to the operation of [section 34], and I apprehend such a limitation must arise whenever the subject matter of the suit is extra-territorial. In controversies between citizens of a state, as to rights derived under that state, and in controversies respecting territorial interests, in which, by the law of nations, the *lex rei sitae* governs, there can be little doubt, that the regulations of the statute must apply. But in controversies affecting citizens of other states, and in no degree arising from local regulations, as for instance, foreign contracts of a commercial nature, I think that it can hardly be maintained, that the laws of a state, to which they have no reference . . . are to be the exclusive guides for judicial decision. Such a construction [of the section] would defeat nearly all the objects for which the constitution has provided a national court.

*Id.* at 1065. This passage suggests that Story believed the federal courts had the power, perhaps even the obligation, to apply proper conflict of laws principles in commercial cases. He does not say that federal courts had the power to decide independently on the substantive rules of the law merchant governing those cases. In this respect, Story's opinion in *Van Reimsdyk* falls short of his opinion in *Swift* thirty years later. Yet it shows, even at this early date, Story's strong conviction that to interpret the *lex loci* principle expansively would be to grant the states a power potentially destructive of a smoothly operating system of commercial law.

*Mandeville & Jameson v. Riddle & Co.*,<sup>118</sup> *Riddle & Co. v. Mandeville & Jameson*,<sup>119</sup> and *Bank of United States v. Weisiger*<sup>120</sup> — the Court explicitly announced that it was following local state law. In other negotiable instrument cases, such as *Coolidge v. Payson*,<sup>121</sup> it followed the general law merchant.

Despite the imprecision with which the outer boundaries of the *lex loci* principle were defined, it was beyond question that a state had substantial power to establish a rule different from that of the general common law. It was likewise beyond question that once a local rule was clearly established, the federal courts were compelled to follow it. The state's power to depart from the general common law posed a substantial threat to the uniformity and coherence of American law. The threat did not spring merely from the operation of section 34. It also stemmed from the underlying structure of a federal system that permitted the states to make their own laws and from the *lex loci* principle that required the courts to follow those laws. But the states had inherited a considerable body of uniform general law. As long as they were willing to preserve that common law, the potentially destructive power of the *lex loci* principle in the American system could be controlled, and the necessity to define the outer boundaries of that principle would not arise.

*C. Marine Insurance: An Example of the Irrelevance of Section 34 to Cases Decided Under the General Common Law*

Marine insurance cases in the early nineteenth century provide the clearest example of the federal courts' deciding cases under the general common law. Fifty-three diversity cases involving marine insurance law were decided by the United States Supreme Court between 1803 and 1840.<sup>122</sup> Considerably more than that number were decided by

<sup>118</sup> 5 U.S. (1 Cranch) 290, 298 (1803).

<sup>119</sup> 9 U.S. (5 Cranch) 322, 328 (1809).

<sup>120</sup> 27 U.S. (2 Pet.) 331, 347-48 (1829).

<sup>121</sup> 15 U.S. (2 Wheat.) 66 (1817); see *infra* note 225.

<sup>122</sup> *Peters v. Warren Ins. Co.*, 39 U.S. (14 Pet.) 99 (1840); *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839); *Columbian Ins. Co. v. Ashby*, 38 U.S. (13 Pet.) 331 (1839); *Bradlie v. Maryland Ins. Co.*, 37 U.S. (12 Pet.) 378 (1838); *Waters v. Merchants' Louisville Ins. Co.*, 36 U.S. (11 Pet.) 213 (1837) (inland waters); *Hazard's Adm'r v. New Eng. Marine Ins. Co.*, 33 U.S. (8 Pet.) 557 (1834); *Carrington v. Merchants' Ins. Co.*, 33 U.S. (8 Pet.) 495 (1834); *Patapsco Ins. Co. v. Southgate*, 30 U.S. (5 Pet.) 604 (1831); *Columbian Ins. Co. v. Ashby*, 29 U.S. (4 Pet.) 139 (1830); *Patapsco Ins. Co. v. Coulter*, 28 U.S. (3 Pet.) 222 (1830); *M'Lanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828); *Buck v. Chesapeake Ins. Co.*, 26 U.S. (1 Pet.) 151 (1828); *General Interest Ins. Co. v. Ruggles*, 25 U.S. (12 Wheat.) 408 (1827); *Columbian Ins. Co. v. Catlett*, 25 U.S. (12 Wheat.) 383 (1827); *Janney v. Columbian Ins. Co.*, 23 U.S. (10 Wheat.) 411 (1825); *Hughes v. Union Ins. Co.*, 21 U.S. (8 Wheat.) 294 (1823); *Dorr v. Pacific Ins. Co.*, 20 U.S. (7 Wheat.) 581 (1822); *Leeds v. Marine Ins. Co.*, 19 U.S. (6 Wheat.) 565 (1821); *Smith v. Universal Ins. Co.*, 19 U.S. (6 Wheat.) 176 (1821); *Olivera v. Union Ins. Co.*, 16 U.S. (3 Wheat.) 183 (1818); *Swan v. Union Ins. Co.*, 16 U.S. (3 Wheat.) 168 (1818); *Hughes*

Supreme Court Justices sitting as trial judges on circuit in diversity cases, particularly by Justice Bushrod Washington on the Third Circuit. In none of these cases did the federal courts follow state court variations from the general common law, and in none of them was section 34 even mentioned.

The federal courts were always conscious in marine insurance cases that they were developing and administering a system of general common law that they shared with the state courts. No court, federal or state, was the necessarily authoritative expositor of what the common law rule on a particular point was or should be. As District Judge Richard Peters said in *Thurston v. Koch*,<sup>123</sup> the United States "should have a national, uniform and generally received law-merchant";<sup>124</sup> when a question was not yet settled, a United States circuit court could, "at least, commence the means of final decision."<sup>125</sup> The federal courts made it very clear that in deciding marine insurance cases they were not deciding questions of local state law. As Justice Washington wrote in *Marine Insurance Co. v. Tucker* in 1806, the Court was following the "law merchant of the land."<sup>126</sup>

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v. Union Ins. Co., 16 U.S. (3 Wheat.) 159 (1818); Leeds v. Marine Ins. Co., 15 U.S. (2 Wheat.) 380 (1817); Morean v. United States Ins. Co., 14 U.S. (1 Wheat.) 219 (1816); Gracie v. Marine Ins. Co., 12 U.S. (8 Cranch) 75 (1814); McCall v. Marine Ins. Co., 12 U.S. (8 Cranch) 59 (1814); Pleasants v. Maryland Ins. Co., 12 U.S. (8 Cranch) 55 (1814); Marcadier v. Chesapeake Ins. Co., 12 U.S. (8 Cranch) 39 (1814); Livingston v. Maryland Ins. Co., 11 U.S. (7 Cranch) 506 (1813); Oliver v. Maryland Ins. Co., 11 U.S. (7 Cranch) 487 (1813); Smith v. Delaware Ins. Co., 11 U.S. (7 Cranch) 434 (1813); Stark v. Chesapeake Ins. Co., 11 U.S. (7 Cranch) 420 (1813); Biays v. Chesapeake Ins. Co., 11 U.S. (7 Cranch) 415 (1813); Caze & Richard v. Baltimore Ins. Co., 11 U.S. (7 Cranch) 358 (1813); Marine Ins. Co. v. Hodgson, 11 U.S. (7 Cranch) 332 (1813); Dickey v. Baltimore Ins. Co., 11 U.S. (7 Cranch) 327 (1813); Maryland Ins. Co. v. LeRoy, 11 U.S. (7 Cranch) 26 (1812); Maryland Ins. Co. v. Ruden's Adm'r, 10 U.S. (6 Cranch) 338 (1810); Livingston v. Maryland Ins. Co., 10 U.S. (6 Cranch) 274 (1810); Chesapeake Ins. Co. v. Stark, 10 U.S. (6 Cranch) 268 (1810); Marine Ins. Co. v. Hodgson, 10 U.S. (6 Cranch) 206 (1810); King v. Delaware Ins. Co., 10 U.S. (6 Cranch) 71 (1810); Maryland Ins. Co. v. Woods, 10 U.S. (6 Cranch) 29 (1810); Yeaton v. Fry, 9 U.S. (5 Cranch) 335 (1809); Marine Ins. Co. v. Young, 9 U.S. (5 Cranch) 187 (1809); Hodgson v. Marine Ins. Co., 9 U.S. (5 Cranch) 100 (1809); Croudson v. Leonard, 8 U.S. (4 Cranch) 434 (1808); Alexander v. Baltimore Ins. Co., 8 U.S. (4 Cranch) 370 (1808); Marshall v. Delaware Ins. Co., 8 U.S. (4 Cranch) 202 (1808); Fitzsimmons v. Newport Ins. Co., 8 U.S. (4 Cranch) 185 (1808); Rhinelander v. Insurance Co. of Pa., 8 U.S. (4 Cranch) 29 (1807); Marine Ins. Co. v. Tucker, 7 U.S. (3 Cranch) 357 (1806); Marine Ins. Co. v. Wilson, 7 U.S. (3 Cranch) 187 (1805); Graves & Barnewall v. Boston Marine Ins. Co., 6 U.S. (2 Cranch) 419 (1804); Church v. Hubbard, 6 U.S. (2 Cranch) 187 (1804); Head & Amory v. Providence Ins. Co., 6 U.S. (2 Cranch) 127 (1804); Marine Ins. Co. v. Young, 5 U.S. (1 Cranch) 332 (1803). This list contains more than 53 cases because it includes one case of inland waters — *Waters v. Merchants' Louisville Ins. Co.* — and because two cases — *Hughes v. Union Ins. Co.* and *Marine Ins. Co. v. Hodgson* — came before the Court on more than one occasion. The list does not include several cases in which the underlying dispute involved marine insurance but in which the question presented to the Court was merely procedural or jurisdictional.

<sup>123</sup> 4 U.S. (4 Dall.) 348 (1800) (opinion of Peters, J.).

<sup>124</sup> *Id.* at 352.

<sup>125</sup> *Id.* at 352a.

<sup>126</sup> 7 U.S. (3 Cranch) 357, 393 (1806).

1. *The General Common Law in the United States Supreme Court.*

— In deciding marine insurance cases, the United States Supreme Court seldom discussed particular state court decisions. In most cases, the Court simply considered the question at large, with occasional reliance on English cases and only infrequent reference to relevant state decisions. In a very few cases, however, the Supreme Court decided questions on which the state courts were in disagreement. An analysis of the Supreme Court's decisions on three such occasions shows that the Court considered itself to be deciding questions of the general law merchant on which it had the right — indeed, the incapable duty — to follow its own judgment on what that general law was or should be.

(a) *Croudson v. Leonard and the Preclusive Effect of Foreign Admiralty Decrees.* — The earliest case in which the Supreme Court decided a question of marine insurance law on which the states were in conflict was *Croudson v. Leonard*<sup>127</sup> in 1808. The question was one that proved vexing as both a political and a legal matter throughout the Napoleonic wars: what legal effect should be given to foreign admiralty courts' decrees of condemnation in prize cases? Under the English rule, such a decree was given preclusive effect in a later civil suit on an insurance policy. In practical terms, the English rule meant that if a vessel was warranted in a policy to be neutral but was captured and thereafter adjudged by an admiralty prize court to have been non-neutral, the underwriter was relieved from paying off under the policy because the insured had breached the warranty.

— There was substantial suspicion that the English and French admiralty courts were prone to find falsely that captured American vessels were not neutral and thus to condemn the vessels as lawful prizes when they were legally entitled to go free. This presented a problem for American merchants whose vessels and cargoes were, in fact, neutral. Insurance premiums for non-neutral property were extremely high, and if the property was in fact neutral, it seemed unjust to have to pay a higher premium merely because of the untrustworthiness of the foreign admiralty courts. But it was risky to pay a lower premium if the merchant was unable to traverse an erroneous decree of a foreign admiralty court to show in a civil suit in a domestic court that the warranty had not been breached.

The New York Supreme Court followed the English rule in three cases between 1799 and 1801.<sup>128</sup> It held that a foreign admiralty decree in a prize case conclusively determined the non-neutral character of the property and that an insured suing on an insurance policy

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<sup>127</sup> 8 U.S. (4 Cranch) 434 (1808).

<sup>128</sup> See *Vandenheuvel v. United Ins. Co.*, 2 Johns. Cas. 127 (N.Y. Sup. Ct. 1801); *Goix v. Low*, 1 Johns. Cas. 341 (N.Y. Sup. Ct. 1800); *Ludlow v. Dale*, 1 Johns. Cas. 16 (N.Y. Sup. Ct. 1799).

in an American court could not introduce evidence to show that the foreign decree was erroneous.<sup>129</sup> But the New York Court for the Correction of Errors reversed the New York Supreme Court decision in the last of the three cases, *Vandenheuvel v. United Insurance Co.*,<sup>130</sup> and held that a foreign admiralty decree was not conclusive.

Four years later, the issue came before the Circuit Court for the District of Columbia sitting in Alexandria in *Croudson v. Leonard*.<sup>131</sup> Under the relevant jurisdictional statute, the District of Columbia Circuit Court was required to follow the state laws of either Virginia or Maryland depending on which state had ceded the territory to the District of Columbia.<sup>132</sup> Hence the circuit court sitting in Alexandria was required to follow Virginia law in cases where state law governed.<sup>133</sup> In *Croudson*, the court noted that there was a conflict among the states on the preclusiveness of a foreign admiralty decree: "The court and bar must know that the question . . . is not settled in this country. It has been decided differently by different courts. In Virginia it has been decided in one way, in New York in another."<sup>134</sup> The circuit court saved the legal question by a special verdict and held that the foreign decree was not conclusive in a later suit in an American court. In other words, it followed the rule announced by the New York Court for the Correction of Errors in *Vandenheuvel* rather than the rule in Virginia,<sup>135</sup> as was entirely proper if it thought the New York decision was correct as a matter of the general law merchant.

Two years later, the case came before the United States Supreme Court. Counsel for both sides submitted the case to the Court without argument because the question had been "several times argued (but not decided)"<sup>136</sup> in *Fitzsimmons v. Newport Insurance Co.*,<sup>137</sup> a case the Court had decided earlier that year. The nature of the argument in *Fitzsimmons* upon which counsel in *Croudson* were willing to rely is significant. *Fitzsimmons* had come up from the United States circuit court sitting in Rhode Island. The argument to the Supreme Court had been explicitly framed on both sides in terms of "general principles"<sup>138</sup> and the "general law"<sup>139</sup> rather than the law of any

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<sup>129</sup> See, e.g., *Ludlow*, 1 Johns. Cas. at 19.

<sup>130</sup> 2 Johns. Cas. 451 (N.Y. 1802).

<sup>131</sup> 6 F. Cas. 901 (C.C.D.C. 1806) (No. 3439).

<sup>132</sup> See *supra* note 103.

<sup>133</sup> See *Riddle & Co. v. Mandeville & Jameson*, 9 U.S. (5 Cranch) 322 (1809); *Mandeville & Jameson v. Riddle & Co.*, 5 U.S. (1 Cranch) 290 (1803); *supra* p. 1534 and note 103.

<sup>134</sup> *Croudson*, 6 F. Cas. at 901.

<sup>135</sup> I have been unable to discover the Virginia case upon which the circuit court relied in concluding that the Virginia rule was different from that of New York.

<sup>136</sup> *Croudson v. Leonard*, 8 U.S. (4 Cranch) 434 (1808).

<sup>137</sup> 8 U.S. (4 Cranch) 185 (1808).

<sup>138</sup> *Id.* at 187.

<sup>139</sup> *Id.* at 188.

particular state. Plaintiff in error's counsel had mentioned state court decisions only to note their inconclusiveness: "As to domestic precedents, they are not decisive. In New York, the law is finally settled against the conclusiveness. But in the supreme court of Pennsylvania, the question is still *sub judice*, as it is in most of the other states."<sup>140</sup> In the end, *Fitzsimmons* was decided on other grounds and the question was not addressed by the Court. But the fact that the counsel in *Croudson* were willing to rest their case on the arguments presented in a Rhode Island case shows that they did not regard the rule in Virginia as having any special bearing on the applicable law.

The Supreme Court in *Croudson* reversed the decision of the circuit court. Justices Washington and Johnson each wrote separate opinions supporting the Court's holding that a foreign admiralty decree conclusively determined the character of captured property. Both Justices discussed the issue as a matter of general law; neither mentioned state court decisions or section 34 of the Judiciary Act.<sup>141</sup> The Supreme Court, by reversing the decision of the circuit court, in effect followed the rule in Virginia. But the way in which this result was achieved shows that the law of Virginia, *ex proprio vigore*, was irrelevant to the outcome. Nowhere in any of the arguments in *Fitzsimmons* that have been preserved, or in either of the two opinions written in *Croudson*, is the law of Virginia so much as mentioned. The issue was thought to be one of general law, to be decided without reference to state court decisions except as they might contribute to an understanding of that general law.<sup>142</sup>

(b) *Olivera v. Union Insurance Co. and Fear of Capture*. — In a second case, the United States Supreme Court decided as a matter of

<sup>140</sup> *Id.* at 190 (citations omitted).

<sup>141</sup> See 8 U.S. (4 Cranch) 434, 436 (1808) (Johnson, J.); *id.* at 442 (Washington, J.). Chief Justice Marshall and Justice Cushing joined the majority without opinion; Justices Chase and Livingston dissented without opinion. See *id.* at 443 n.1.

<sup>142</sup> In the end, all the states except New York adopted the English rule followed by the United States Supreme Court in *Croudson*. Justice Theodore Sedgwick of the Massachusetts Supreme Judicial Court went out of his way in 1810 to criticize the New York Court for the Correction of Errors' decision in *Vandenheuvel* for being primarily political rather than legal:

It is true, that [the judgment of the New York Supreme Court in *Vandenheuvel*] was reversed by the court of errors. But when I consider the characters of the judges of the two courts: — the first composed of grave, respectable, and learned lawyers, — and the second constituted by popular elections, I derive, at least, as much satisfaction from the unanimity of the former, the result of their laborious investigation, as from the opposing decision of the latter. It can hardly be supposed that the reversal of a judgment, so rendered, can be considered as finally deciding, in that state, this important question.

*Baxter v. New England Marine Ins. Co.*, 6 Mass. 277, 298 (1810). For statements of the rules in the other states, see *Brown v. Union Ins. Co.*, 4 Day 179, 187–88 (Conn. 1810); *Maryland & Phoenix Ins. Cos. v. Bathurst*, 5 G. & J. 159, 220 (Md. 1833); *Calhoun v. Insurance Co. of Pa.*, 1 Binn. 293, 304–05 (Pa. 1808) (recognizing general rule but permitting exception because of special clause in the policy); *Groning v. Union Ins. Co.*, 10 S.C.L. (1 Nott & McC.) 537, 540 (1819); *Bailey v. South Carolina Ins. Co.*, 5 S.C.L. (1 Brev.) 541 (1809).

general common law a question involving fear of capture of an insured vessel. A customary clause in insurance policies provided that the underwriters agreed to indemnify the insured against "arrests, restraints, and detainments of all kings, princes, or people."<sup>143</sup> The operation of the "restraint of princes" clause was straightforward when an insured vessel was actually captured. But problems arose when the master of the vessel avoided capture by, for example, sailing to another port after learning that the port of destination named in the policy was blockaded by a hostile force. Such a situation presented a dilemma. Under ordinary circumstances, if the vessel sailed to another port, the underwriter would be justified in refusing payment because the insured had "deviated" from the voyage described in the policy. On the other hand, if the vessel were captured after sailing into the blockade, the underwriter would be justified in refusing payment because the attempted breach of a blockade was evidence of non-neutrality.

The English rule appeared to be that deviation resulting from fear of capture did not constitute a "restraint of princes" and thus voided the policy.<sup>144</sup> Justice Washington, sitting on circuit in *Simonds v. Union Insurance Co.*<sup>145</sup> in 1806, held that a blockade that prevented a landing justified a claim against the underwriter, but the strength of the holding was uncertain because the policy was not written in the usual form. A year later, the New York Supreme Court held in *Schmidt v. United Insurance Co.*<sup>146</sup> that an actual blockade — which the court distinguished from a mere report of a blockade<sup>147</sup> — justified a claim under a policy written in the usual form.

The Massachusetts Supreme Judicial Court, however, adhered to a strict version of the English rule. In *Richardson v. Maine Fire & Marine Insurance Co.*<sup>148</sup> in 1809, the court held that even after an insured vessel was stopped by an armed British vessel, told of a British blockade at its intended destination, and warned not to proceed with its intended voyage on penalty of seizure, there was no valid claim against the underwriters under a "restraint of princes" clause.<sup>149</sup> Six years later, in *Brewer v. Union Insurance Co.*<sup>150</sup> the question again came up in Massachusetts, this time under circum-

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<sup>143</sup> I have taken this phrasing of the clause from the standard form policy contained in 1 S. MARSHALL, *supra* note 31, at 851; for another standard form policy, see J. PARK, A SYSTEM OF THE LAW OF MARINE INSURANCES 524 (1st American ed. Philadelphia 1789) (1st ed. London 1787).

<sup>144</sup> See 1 W. PHILLIPS, TREATISE ON THE LAW OF INSURANCE 260-64 (Boston 1823).

<sup>145</sup> 22 F. Cas. 165 (C.C.D. Pa. 1806) (No. 12,875).

<sup>146</sup> 1 Johns. 249 (N.Y. Sup. Ct. 1806).

<sup>147</sup> See *id.* at 253.

<sup>148</sup> 6 Mass. 102 (1809).

<sup>149</sup> See *id.* at 110.

<sup>150</sup> 12 Mass. 169 (1815).

stances even more favorable to the insured. The vessel had been trapped by a blockading force in the port of Buenos Aires with virtually no possibility of escape. The court nevertheless applied the *Richardson* rule. It concluded that there had been "no application of hostile force" and that although this was "certainly a very strong case . . . we cannot make new and nice distinctions."<sup>151</sup>

In 1810, the United States Supreme Court had held in *King v. Delaware Insurance Co.*<sup>152</sup> that a vessel's being warned off from a blockaded port was not covered by a policy written in the usual form. But in 1818, in *Olivera v. Union Insurance Co.*,<sup>153</sup> the Supreme Court faced a more difficult case that appeared to require a different result depending on whether the New York or Massachusetts rule was applied. A vessel carrying cargo insured under the usual clause had sailed from Baltimore on a voyage to Cuba. It encountered a blockading British squadron at the mouth of Chesapeake Bay but tried to get through to the open sea. The vessel was stopped and boarded, and its master was warned not to attempt to break the blockade. The vessel then returned to Baltimore, and the owner claimed against the underwriter.

On writ of error to the Circuit Court for the District of Maryland, the United States Supreme Court held that the blockade constituted a restraint within the meaning of the policy. Chief Justice Marshall approached the question with the caution of a good common law lawyer. After finding no English case precisely on point, he looked to American cases:

The decisions of our own country would be greatly respected, were they uniform; but they are in contradiction to each other. In New York, it has been held, that a blockade *is*, and in Massachusetts, that it *is not*, a peril within the policy. The opinions of the judges of both these courts are, on every account, entitled to the highest consideration. But they oppose each other, and are not given in cases precisely similar to that now before this court.<sup>154</sup>

Marshall then distinguished *Brewer v. Union Insurance Co.* by noting that "no physical force" had been directly applied. Reasoning by "analogy to principles which have been settled," Marshall concluded that when a vessel had been actually "stopped and turned back" the economic purpose of the voyage was as much destroyed as if an actual capture had been made, and that indemnification was therefore required.<sup>155</sup> Marshall failed in *Olivera* to inquire into the state of Maryland law, even though the case had come up from the Circuit

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<sup>151</sup> *Id.* at 171.

<sup>152</sup> 10 U.S. (6 Cranch) 71 (1810).

<sup>153</sup> 16 U.S. (3 Wheat.) 183 (1818).

<sup>154</sup> *Id.* at 191.

<sup>155</sup> *Id.* at 192-94.



Court for the District of Maryland. This fact, along with his treatment of the New York and Massachusetts cases, indicate that he approached the question as one of general common law rather than local state law.<sup>156</sup>

It appears from Willard Phillips' American treatise on insurance, published five years after *Olivera*, that Phillips and the profession also considered the question to be one of general common law. After a lengthy discussion of the federal and state cases on fear of capture, Phillips concluded that the Supreme Court had decided the general law correctly in *Olivera*: "it seems to be difficult to comprehend how an absolute interruption and destruction of the voyage by a peril insured against, is not a loss within the policy."<sup>157</sup> Phillips apparently considered it so obvious that the Court had decided the question as a matter of the general law merchant that he did not even discuss the issue of the source of law.

(c) *Patapsco Insurance Co. v. Southgate*, *Bradlie v. Maryland Insurance Co.*, and *Abandonment for a Technical Total Loss*. — A third group of cases was decided relatively late in the development of American marine insurance law. They involved the application of the principle that a shipowner could abandon his insured vessel to the underwriter if the vessel had suffered a total loss. In cases of actual total loss, the application of this principle was relatively straightforward: the underwriter simply paid the shipowner the value of the vessel.<sup>158</sup> There was, however, a somewhat more difficult case called a "technical" or "constructive" total loss: if the amount required to repair the vessel exceeded one-half its value, the shipowner had the option either of abandoning the vessel to the underwriter as if it were an actual total loss or of keeping the vessel and seeking indemnification for the cost of the repairs.<sup>159</sup>

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<sup>156</sup> The Supreme Court's decision in *Olivera* was perceived by state courts to be based on general common law rather than on Maryland law. See, e.g., *Saltus v. United Ins. Co.*, 15 Johns. 523, 529 (N.Y. Sup. Ct. 1818); *Thompson v. Read*, 12 Serg. & Rawle 440, 444 (Pa. 1820). The rule in South Carolina, although not entirely clear, appears to have been in accord with *Olivera*. See *Messonier v. Union Ins. Co.*, 10 S.C.L. (1 Nott & McC.) 155 (1818).

A decision by the Maryland Court of Appeals four years after *Olivera*, *Patterson v. Marine Ins. Co.*, 5 H. & J. 417 (Md. 1822), appears to be inconsistent with the United States Supreme Court's decision. A vessel sailing under policies written in the usual form was boarded and turned back by a blockading British squadron. The Maryland court affirmed the trial judge's refusal to instruct the jury that if they believed these facts, the owner of the vessel and cargo should recover against the insurer. Unfortunately, no opinion of the court is reproduced in the report of the case. The arguments of counsel, which are reproduced, refer to federal and state decisions, including *Olivera* and *Brewer*. *Id.* at 420-23.

<sup>157</sup> 1 W. PHILLIPS, *supra* note 144, at 275.

<sup>158</sup> If the vessel were lost at sea, the underwriter obviously took nothing. But if there were economic value left in the wreck, as sometimes happened when the vessel was stranded on a reef or on the shore, the underwriter took what remained of the vessel in return for paying off the ships' owners under the policy.

<sup>159</sup> If the insured chose to abandon for a technical total loss, the underwriter, who became

All American jurisdictions were in general agreement on what constituted a technical total loss. But there remained unsettled several subsidiary questions about how to calculate the value of the vessel and the cost of repairs for purposes of the doctrine. Two such questions proved troublesome at a surprisingly late date. First, should the value of the vessel be assumed to be the value stated in the policy, or should it be the actual value of the vessel at the time of the loss? And second, should the cost of the repairs be the estimated actual expense of the repairs, or should "one-third new for old" (normally used to calculate the amount of indemnification paid for actual repairs after partial losses) be deducted from the estimated actual expense?

There appears to have been relatively little law on these precise questions until the 1820's. In an 1814 case, *Fontaine v. Phoenix Insurance Co.*,<sup>160</sup> the New York Supreme Court reviewed a case in which Chief Justice Kent, sitting as trial judge, had instructed the jury that the controlling value was the actual value of the vessel rather than the value stated in the policy,<sup>161</sup> but the court ultimately disposed of the appeal on another issue.<sup>162</sup> In an early case, *Dupuy v. United Insurance Co.*,<sup>163</sup> the New York Supreme Court had held that the "one-third new for old" deduction should not be used in technical abandonment cases,<sup>164</sup> but *Dupuy* had been overruled by the New York Court for the Correction of Errors in *Smith v. Bell*<sup>165</sup> in 1805. Finally, there was some inconclusive language in an 1819 Massachusetts case, *Coolidge v. Gloucester Marine Insurance Co.*,<sup>166</sup> that could possibly be read to mean that the one-third deduction should not be taken in a technical abandonment case.<sup>167</sup>

In 1822, both questions came before Justice Story in an admiralty case on circuit in Massachusetts, *Peele v. Merchants' Insurance Co.*<sup>168</sup> The case arose out of the famous wreck of the *Argonaut*,<sup>169</sup> after which the shipowners sought to abandon the ship to the underwriters

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the owner of the vessel after paying off under the policy, typically repaired the ship and sold it.

<sup>160</sup> 11 Johns. 293 (N.Y. Sup. Ct. 1814).

<sup>161</sup> See *id.* at 295.

<sup>162</sup> See *id.* at 299-301.

<sup>163</sup> 3 Johns. Cas. 182 (N.Y. Sup. Ct. 1802).

<sup>164</sup> See *id.* at 183.

<sup>165</sup> 2 Cai. Cas. 153, 157-58 (N.Y. 1805).

<sup>166</sup> 15 Mass. 341, 343-44 (1819).

<sup>167</sup> See *Peele v. Merchants' Ins. Co.*, 19 F. Cas. 98, 115 (C.C.D. Mass. 1822) (No. 10,905).

<sup>168</sup> 19 F. Cas. 98 (C.C.D. Mass. 1822) (No. 10,905). *Peele* was one of the very few marine insurance cases brought in the admiralty rather than the diversity jurisdiction. As discussed below, *infra* p. 1553, this did not affect the rule of law applied in the case.

<sup>169</sup> Another suit was brought in the Massachusetts courts on another policy on the same vessel. See *Peele v. Suffolk Ins. Co.*, 24 Mass. (7 Pick.) 254 (1828). The Massachusetts Supreme Judicial Court referred, without explanation, to the "unfortunate and somewhat singular course of the controversy upon this policy." *Id.* at 256.

as a technical total loss.<sup>170</sup> Not wanting to accept the abandonment, the underwriters contended that the value stated in the policy should be used rather than the lower actual value of the ship at the time it was wrecked. They contended, further, that a deduction of one-third should be applied to the actual expense of repairs under the "new for old" doctrine. The consequence of the underwriters' position would have been to increase the value of the ship and to decrease the cost of repair to such an extent that the shipowners would have lost the right to insist on a technical abandonment. The shipowners, on the other hand, insisted that the actual value of the ship and the actual expense of repairs should be used. This would have resulted in a cost of repairs in excess of half of the value of the ship and thus would have entitled them to abandon.

After a lengthy discussion, Story decided both issues in favor of the insured. Willard Phillips' insurance treatise, published a year after *Peele*, endorsed Story's decision on the first question of valuation and described the argument on the deduction question as evenly balanced on both sides.<sup>171</sup> James Kent, in the third volume of his *Commentaries*, published in 1828, endorsed Story's position on both points. On the valuation question Kent wrote, "The value of the ship at the time of the accident, is the true basis of calculation."<sup>172</sup>

The valuation question came before the United States Supreme Court in *Patapsco Insurance Co. v. Southgate*<sup>173</sup> in 1831, on a writ of error to the Circuit Court for the District of Maryland. Echoing Kent's words and not discussing the rule of any particular state, Justice Smith Thompson (formerly a justice of the New York Supreme Court) concluded for the Court that "the value of the vessel at the time of the accident is the true basis of calculation."<sup>174</sup> Four years later, in *Deblois v. Ocean Insurance Co.*,<sup>175</sup> the Massachusetts Supreme Judicial Court handed down rulings on both the valuation and the deduction questions that contradicted Story's decision in *Peele* and the United States Supreme Court's decision on the valuation question in *Patapsco*. The Massachusetts court wrote, "We hope that in this State it will be considered as settled, that the value in the policy is to govern; and that a deduction of one third new for old is to be

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<sup>170</sup> For a useful summary of the litigation and a selection from the pleadings and from letters between the lawyers, see 2 THE PAPERS OF DANIEL WEBSTER 474-89 (A. Konefsky & A. King eds. 1983).

<sup>171</sup> See 1 W. PHILLIPS, *supra* note 144, at 401-05.

<sup>172</sup> 3 J. KENT, *supra* note 17, at 277. Kent cited his own New York Supreme Court decision in *Dupuy* in 1802, noted with a simple "*contra*" its later overruling by the New York Court for the Correction of Errors in *Smith*, and cited the Massachusetts *Coolidge* decision and Justice Story's decision in *Peele*. *Id.* at 277 n.a.

<sup>173</sup> 30 U.S. (5 Pet.) 604 (1831).

<sup>174</sup> *Id.* at 620.

<sup>175</sup> 33 Mass. (16 Pick.) 303 (1835).

made in regard to technical total losses . . . ."<sup>176</sup> Three years later, the New York Court for the Correction of Errors, in *American Insurance Co. v. Ogden & McComb*,<sup>177</sup> endorsed the position of the Massachusetts court on both questions.<sup>178</sup>

In the same year that *Ogden* was decided, both questions came before the United States Supreme Court in *Bradlie v. Maryland Insurance Co.*,<sup>179</sup> another case on writ of error to the Circuit Court for the District of Maryland. The Court, in an opinion by Justice Story, reaffirmed its holding in *Patapsco* on the actual value of the vessel and held, further, that the "one-third new for old" deduction should not be taken. Story relied on the Court's prior holding in *Patapsco*, on an English case, and on Kent's *Commentaries*. He neither cited nor discussed the contrary holdings in Massachusetts or New York.

Immediately after the Supreme Court's decision in *Bradlie*, Story decided a case on circuit that involved both questions, *Robinson v. Commonwealth Insurance Co.*<sup>180</sup> The Supreme Court had decided *Patapsco* and *Bradlie* on principles of the general law merchant without consulting the law of any particular state. But the Massachusetts court in *Deblois* had decided the same questions differently. Thus, when sitting on circuit in Massachusetts in *Robinson*, Story was caught between two clearly conflicting interpretations of law. His response was to say, in language that prefigured *Swift*, that the subject matter of the case determined the character of the law:

I am aware, that a rule somewhat different has been laid down by the supreme court of Massachusetts, for whose judgments I entertain the most unfeigned respect. But questions of a commercial and general nature, like this, are not deemed by the courts of the United States to be matters of local law, in which the courts of the United States are positively bound by the decisions of the state courts. They are deemed questions of general commercial jurisprudence, in which every court is at liberty to follow its own opinion, according to its own judgment of the weight of authority and principle. On the present occasion, I feel myself bound to follow the doctrine of the supreme court of the United States, by whose judgment, indeed, I am bound; although, even as a new question, I have no hesitation to say, that I entirely concur in that judgment.<sup>181</sup>

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<sup>176</sup> *Id.* at 314. The opinion was written by Justice Samuel Putnam, in whose law offices Joseph Story had studied as a young man. See G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 432 (1970); 1 W. STORY, *supra* note 5, at 84.

<sup>177</sup> 20 Wend. 287 (N.Y. 1838).

<sup>178</sup> See *id.* at 298.

<sup>179</sup> 37 U.S. (12 Pet.) 378 (1838).

<sup>180</sup> 20 F. Cas. 1002 (C.C.D. Mass. 1838) (No. 11,949).

<sup>181</sup> *Id.* at 1004 (footnote omitted). One is tempted to read Justice Story's opinion in *Robinson* to hold that in marine insurance cases a state could not establish a local rule, within the meaning of the *lex loci* principle, even if it wanted to. Indeed, Story may well have intended his opinion to have been read in precisely that fashion. But Story did not have to face the issue in *Robinson*, because the Massachusetts court had not clearly decided the question as a matter of local law.

It is probable that federal circuit courts had been caught between two contradictory decisions of marine insurance law in the federal and state courts in cases earlier than *Robinson*. For example, the circuit court in *Croudson* apparently thought itself to have been in such a position. But the circuit reports are so fragmentary in the states in which direct conflicts were most likely to have occurred — in New York, and in Massachusetts before Story came on the bench — that we simply cannot know how many such cases there were, if indeed there were any. But even considering the inadequacy of the reports, it is remarkable that the earliest reported circuit court case in which a square conflict was clearly presented was not decided until 1838. This late date is eloquent testimony to the success of the federal and state courts in creating and maintaining a general law merchant of marine insurance that belonged simultaneously to all the courts and to none of the courts in particular.

2. *The View from the State Courts.* — The state courts regarded the decisions of the federal courts in marine insurance cases in the same way the federal courts themselves did — as decisions under the general law of marine insurance that the federal and state courts jointly administered. *Dorr v. New England Insurance Co.*,<sup>182</sup> a case decided by the Massachusetts Supreme Judicial Court, provides an interesting example. The issue was whether the insured could abandon his vessel to the underwriter when, at the time of the attempted abandonment, the insured thought that the vessel had been captured. This was a difficult question. Although an insured had a right to abandon in case of capture, poor communications frequently resulted in an abandonment's being made at a time when, unbeknownst to either the policy holder or the underwriter, the vessel had been released by the captor. In 1808, when the case came before the Massachusetts court, the law was unsettled on whether the actual facts or the information available to the parties at the time of abandonment should govern. An earlier unreported jury instruction by Justice William Cushing of the United States Supreme Court, sitting on the First Circuit in Boston, had rested on the premise that the local usage of Boston (that the right to abandon should be determined according to the information at the time of the abandonment) correctly reflected the law. But a more recent decision by Justice Washington on the Third Circuit, in a case referred to as *The Rolla*,<sup>183</sup> held that the actual facts should govern.

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Particularly when viewed in conjunction with the New York decision in *Ogden*, the Massachusetts court's decision in *Deblois* looks much more like a disagreement with the United States Supreme Court over what the general common law required than it does an attempt to establish a local rule deviating from the common law.

<sup>182</sup> 4 Mass. 198 (1808).

<sup>183</sup> See *id.* at 202. *The Rolla* was almost certainly *Marshall v. Delaware Ins. Co.*, 16 F. Cas. 838 (C.C.D. Pa. 1807) (No. 9127). *Marshall* involved the capture of the brig *Rolla*. Justice Washington held that the actual state of facts at the time of an attempted abandonment

Charles Jackson, counsel for the plaintiff in *Dorr*, tried to escape the force of Justice Washington's holding in *The Rolla* in a revealing way:

It cannot be denied that the opinion of Judge *Washington*, as reported in the case of the *Rolla*, is in point against plaintiff's claim. But a contrary decision has been made by the Circuit Court sitting in this district; and while it is conceded that Judge *Washington* is among the first common lawyers in the *United States*, it will not be denied us that commercial law is at least as well understood in this part of the Union, as in *Virginia*.<sup>184</sup>

The form of Jackson's argument shows that he considered the question to be one of general rather than local law. Jackson did not argue that Justice Cushing had applied local Massachusetts law in following the Boston usage. Although Cushing's instruction was clearly in accordance with the local practice of the Boston merchants and underwriters, Jackson argued that Cushing's interpretation was the correct *general* rule. Jackson appealed to local pride, not to local law: Cushing's ruling should be followed because the general commercial law was "as well understood" in Massachusetts as in other parts of the union.<sup>185</sup>

3. *The General Common Law in Federal Admiralty Courts: Justice Story and the Non-Escape from Section 34.* — A dispute over the extent of admiralty jurisdiction provides further evidence that the federal courts followed the general common law in marine insurance cases and that no contemporary lawyer or judge understood section 34 to require otherwise. Section 9 of the Judiciary Act of 1789 gave the United States district courts exclusive original jurisdiction over prize and criminal cases in admiralty, and concurrent original juris-

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determined the right to abandon, and his decision was affirmed by the Supreme Court in *Marshall v. Delaware Ins. Co.*, 8 U.S. (4 Cranch) 202 (1808). The case was brought to the attention of the Massachusetts court when a note in a recent newspaper was read in the courtroom.

The lawyers and the Massachusetts Supreme Judicial Court in *Dorr* were apparently unaware that *The Rolla* and *Marshall* were the same case. Charles Jackson, attorney for the plaintiff in *Dorr*, in attempting further to reduce the force of Justice Washington's holding in *The Rolla*, noted that Justice Washington's "opinion was also subject to revision in the Supreme Court." *Dorr*, 4 Mass. at 204. Chief Justice Parsons noted that a "decision of the Supreme National Court in the case of *Marshall v. The Delaware Insurance Co.*, not yet reported, [was] cited in point." *Dorr*, 4 Mass. at 205. Neither man, it seems, was aware that the United States Supreme Court's decision in *Marshall* was an affirmation of Justice Washington's decision.

<sup>184</sup> *Dorr*, 4 Mass. at 204.

<sup>185</sup> Chief Justice Parsons recognized the difficulty of the legal question, as well as the practical difficulty caused by the fact that many premiums in Massachusetts had been set in reliance on the "state of information" custom in Boston. He avoided the question by finding that the underwriters had failed to establish that the vessel had been released by the time of the attempted abandonment. Therefore, at least as far as the facts proved at trial showed, the actual facts and the state of information at the time of abandonment were the same. See *id.* at 206-07.

diction, because of the "saving to suitors" clause, over civil suits in which the common law courts also provided a remedy.<sup>186</sup> In the exercise of their admiralty jurisdiction, including their concurrent civil, or "instance," jurisdiction, the federal courts were not controlled by the literal command of section 34. As Chief Justice Marshall had pointed out,<sup>187</sup> section 34 applied only to trials "at common law as contradistinguished from" suits in "equity or admiralty."<sup>188</sup> Because of this construction of section 34, there was never any suggestion that the section might prevent a federal court from using the general common law in an admiralty case. Therefore, if section 34 barred the use of general common law in diversity cases, as the conventional modern view would have it, any debate over the expansion of admiralty jurisdiction should have included a discussion of the merits of an expanded use of general common law at the expense of state law.

In 1815, Joseph Story decided *De Lovio v. Boit*,<sup>189</sup> a circuit court case that permits this hypothesis to be tested. Story held in *De Lovio* that the concurrent admiralty jurisdiction of the federal courts extended to disputes involving maritime contracts, including marine insurance cases. *De Lovio* was not appealed to the Supreme Court, and for a number of years it was nothing more than circuit law.<sup>190</sup> But the decision provoked a sharp debate about the extent of admiralty jurisdiction over maritime contracts. The ability of federal courts to rely on the general common law was never at issue at any time during this debate.<sup>191</sup>

Those who opposed *De Lovio* — most notably, Justice William Johnson of the Supreme Court<sup>192</sup> and James Kent, recently retired

<sup>186</sup> 1 Stat. 73, 76-77 (1789) (codified as amended at 28 U.S.C. § 1333 (1982)).

<sup>187</sup> See *United States v. Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.).

<sup>188</sup> *Id.* at 188.

<sup>189</sup> 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

<sup>190</sup> In *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1870), the Supreme Court finally held that marine insurance contracts came within the admiralty jurisdiction.

<sup>191</sup> Professor Horwitz suggests that in *De Lovio* Justice Story unsuccessfully "attempted to do almost precisely the same thing as he later tried to accomplish in *Swift v. Tyson*." M. HORWITZ, *supra* note 3, at 252. I understand Professor Horwitz to mean that, by attempting to expand admiralty jurisdiction to include commercial contracts such as marine insurance, Story tried to expand the category of cases in which "the federal judiciary was not bound by state judicial decision but rather was free independently to decide a case on the basis of 'the general principles of commercial law.'" *Id.* at 245 (quoting *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842)). Professors Konefsky and King, following Horwitz, write that in *De Lovio*, Story "tried to federalize commercial maritime transactions under the admiralty jurisdiction." 2 THE PAPERS OF DANIEL WEBSTER, *supra* note 170, at 422. This plausible (but incorrect) conclusion is based on the conventional modern assumption that section 34 prevented federal common law courts sitting in diversity from deciding cases according to the general common law whereas federal admiralty courts were not prevented from doing so.

<sup>192</sup> Johnson objected to "this silent and stealing progress of the Admiralty in acquiring jurisdiction to which it has no pretensions." *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 614

from the New York courts<sup>193</sup> — primarily objected to the expansion of federal jurisdiction.<sup>194</sup> This was an issue of genuine importance because, under *De Lovio*, parties of nondiverse citizenship could bring into the federal admiralty forum claims that would otherwise have been confined to state forums because of lack of diversity. For his part, Story saw this expansion of federal jurisdiction as the great advantage of the case, because he thought that expanding jurisdiction would help to produce “a uniformity of rules and decisions in all maritime questions.”<sup>195</sup>

(6th Cir. 1827) (Johnson, J., concurring). Johnson had earlier criticized *De Lovio* in *The Amanda* v. Johnson, *City Gazette and Commercial Daily Advertiser* (Charleston, S.C.), Jan. 18, 1822, at 1, col. 1. He also attacked *De Lovio* in an anonymous pamphlet published in the mid-1820's. *See REVIEW OF DU PONCEAU ON THE JURISDICTION OF THE COURTS OF THE UNITED STATES* 35-37, 46-52 (n.p. n.d.). My attribution to Johnson is based on a handwritten notation reading, “The Honorable William Johnson, One of the Judges of the Supreme Court of the United States,” that appears on the title page of the copy held by the Boalt Hall School of Law, University of California at Berkeley.

Justice Henry Baldwin also objected to *De Lovio* in *Bains v. The James & Catherine*, 2 F. Cas. 410 (C.C.D. Pa. 1832) (No. 756).

<sup>193</sup> In the first volume of his *Commentaries*, Kent objected that under *De Lovio* “the state courts would be divested, at one stroke, of a vast field of commercial jurisdiction.” 1 J. KENT, *COMMENTARIES ON AMERICAN LAW* 347 (New York 1826).

<sup>194</sup> Opponents of *De Lovio* also complained about the absence of a right to trial by jury in admiralty. *See, e.g., Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 640 (1827) (Johnson, J., concurring) (“Every advance of the Admiralty is a victory over the common law; a conquest gained upon the trial by jury.”).

<sup>195</sup> *De Lovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3776). Story never claimed for the federal courts more than concurrent jurisdiction over maritime contracts. He noted in his *Commentaries on the Constitution* that Kent had feared that *De Lovio* would result in the states’ being divested of their jurisdiction but wrote that Kent’s opinion was “founded on a mistake”:

The reasonable interpretation of the constitution would seem to be, that it conferred on the national judiciary the admiralty and maritime jurisdiction, exactly according to the nature and extent and modifications, in which it existed in the jurisprudence of the common law. Where the jurisdiction was exclusive, it remained so; where it was concurrent, it remained so. . . . The judiciary act, of 1789, ch. 20, § 9 [containing the saving to suitors clause], has manifestly proceeded upon this supposition . . . .

J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 533 n.3 (Boston 1833).

The scope of the concurrent jurisdiction that Story asserted under *De Lovio* was rather restricted. He never suggested that cases arising out of commercial contracts between merchants engaged in interstate or international trade by water, or out of negotiable instruments used in such trade, were cognizable in admiralty. The scope of *De Lovio* is suggested by *Plummer v. Webb*, 19 F. Cas. 891, 894 (C.C.D. Me. 1827) (No. 11,233) (Story, C.J.) (“In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction, that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime.”); *Andrews v. Essex Fire & Marine Ins. Co.*, 1 F. Cas. 885 (C.C.D. Mass. 1822) (No. 374) (Story, C.J.) (holding no admiralty jurisdiction over suit to reform contract of marine insurance). *But cf. M. HORWITZ, supra* note 3, at 251 (“Before 1815, it should be emphasized, commercial law revolved almost completely around maritime transactions, so that the effect of *De Lovio* was to create a federal commercial forum.”).



Story and his opponents, however, never discussed the substantive law that would be applied in admiralty. There was no discussion of this issue because the choice of the federal diversity common law forum or the federal admiralty forum made no difference to the substantive law that was applied. The procedures in admiralty were frequently different, and certain remedies were better (in particular, the ability to attach a vessel). But the substantive rules of contractual liability in commercial cases were governed by the general common law in admiralty courts, just as they were in federal common law courts sitting in diversity.

Story's decision in 1822 in *Peele v. Merchants' Insurance Co.*<sup>196</sup> is the clearest demonstration that the substantive rules of marine insurance law in admiralty and diversity were identical. *Peele* was one of the few admiralty libels ever brought on a marine insurance contract.<sup>197</sup> Story's approach to the substantive legal questions in *Peele* was identical to his approach to similar questions in diversity on circuit, as well as to the approach of the Supreme Court to appeals of marine insurance cases in diversity. Two of the questions Story decided in *Peele* came before the Supreme Court in later diversity cases, *Patapsco Insurance Co v. Southgate*<sup>198</sup> in 1831, *Insurance Co v. Southgate*<sup>198</sup> in 1831, and *Bradlie v. Maryland Insurance Co.*<sup>199</sup> in 1838. The Supreme Court decided the questions on the basis of the general law merchant, just as Story had done in *Peele*, and indeed arrived at the result that Story had on both questions.<sup>200</sup>

In sum, the federal decisions in marine insurance cases demonstrate that the federal courts consistently decided marine insurance cases as a matter of general common law. In this process, the federal courts found state court decisions to be helpful, sometimes even persuasive; but they did not regard them as more than that. In these federal cases, section 34 of the Judiciary Act was simply not relevant. That section required only that local state law be followed. With the possible exceptions of the *Robinson* case in Massachusetts and the

<sup>196</sup> 19 F. Cas. 98 (C.C.D. Mass. 1822) (No. 10,905).

<sup>197</sup> Merchants typically had the power to choose the forum because they were almost always plaintiffs (or libelants) in marine insurance cases. They were strikingly unwilling to trade the right to a jury trial for the right to have their cases heard in admiralty. After *De Lovio*, only three marine insurance cases were brought before Story in admiralty. See *Hale v. Washington Ins. Co.*, 11 F. Cas. 189 (C.C.D. Mass. 1842) (No. 5916) (upholding admiralty jurisdiction); *Peele v. Merchants' Ins. Co.*, 19 F. Cas. 98 (C.C.D. Mass. 1822) (No. 10,905) (same); *Andrews v. Essex Fire & Marine Ins. Co.*, 1 F. Cas. 885 (C.C.D. Mass. 1822) (No. 374) (denying admiralty jurisdiction on ground that relief sought — reformation of a contract — was available only in a court of equity). During that period, Story heard 31 marine insurance cases at common law in diversity, and the Massachusetts Supreme Judicial Court heard 98 marine insurance cases at common law.

<sup>198</sup> 30 U.S. (5 Pet.) 604 (1831).

<sup>199</sup> 37 U.S. (12 Pet.) 378 (1838).

<sup>200</sup> See *supra* pp. 1547–48.

*Croudson* case in Virginia, there is no record of any federal court's having decided a case in which the courts of the state in which the federal court sat had arrived at a contrary decision as a matter of local law. The federal decisions in marine insurance cases thus do not demonstrate an established practice in the federal courts of ignoring contrary decisions of the courts of the state in which the federal suit was brought. They demonstrate, instead, that both the state and federal courts considered themselves in marine insurance cases to be deciding questions of general common law. Given the awkwardness of the American federal system, it is remarkable that marine insurance law should have been so regarded. In the next Section, I examine some of the factors that permitted this result.

## II. THE DEVELOPMENT AND ADMINISTRATION OF THE GENERAL COMMON LAW IN THE FEDERAL SYSTEM: THE EXAMPLE OF MARINE INSURANCE

Marine insurance is the best example of a system of general common law jointly administered by the state and federal courts during the early nineteenth century. To an unusual degree, it fulfilled the twin aspirations of the age for the law merchant: certainty and uniformity. During the first two decades of the century, the state and federal courts in the important commercial states were self-consciously engaged in what they all saw as the common enterprise of establishing a general common law of marine insurance. All the courts considered themselves to be deciding questions under a general law merchant that was neither distinctively state nor federal. Indeed, at the beginning of this period, they tended to view the general law merchant as a body of law common to all the trading nations of the Western world. By the mid-1820's, American courts had substantially completed the development of a highly uniform and comprehensive system of marine insurance law that American underwriters and merchant shippers employed with remarkably little friction and regarded with considerable pride.

The following Sections trace the development of marine insurance law in the American federal system. The awkward nature of American federalism made it difficult to develop and maintain any system of general common law. The centrifugal forces of American federalism, the *lex loci* principle partially embodied in section 34, and the absence of a central common law appellate tribunal all threatened the uniformity of any general system of nonfederal law. But in certain areas of law — of which marine insurance law is the prime example — circumstances were sufficiently favorable and forces of cohesion sufficiently strong that a system of general common law could be successfully developed and maintained.

*A. The Development of Marine Insurance Law in the United States:  
An Overview*

The commercial importance of American marine insurance and the rapidity of its growth were striking. Joseph Story described its beginnings in 1825 in a book review in the *North American Review*:

It was not until the French Revolution, by opening new and extensive sources of profitable trade, gave an impulse to our maritime enterprise, that the contract [of marine insurance] struggled into notice from a state of languor, and became common in our commercial cities. It immediately advanced with almost inconceivable rapidity, and became so profitable, that it may truly be said to have laid the foundation of many fortunes in our country.<sup>201</sup>

James Kent characterized the new business of insurance litigation in New York in the late 1790's as "immense."<sup>202</sup> Horace Binney's biographer describes marine insurance litigation in Philadelphia at a somewhat later period, but to much the same effect: "insurance cases were probably never so numerous or important as in Philadelphia from 1807 to 1817."<sup>203</sup>

The judicial system into which the flood of marine insurance litigation flowed was, at the beginning, extremely primitive. As James Kent described the conditions in New York, "When I came to the Bench [in 1798] there were no reports or State precedents. The opinions from the Bench were delivered *ore tenus*. We had no law of our own, and nobody knew what it was."<sup>204</sup> Jeremiah Mason, a promi-

<sup>201</sup> Story, Book Review, 20 N. AM. REV. 47, 70-71 (1825) (reviewing W. PHILLIPS, A TREATISE ON THE LAW OF MARINE INSURANCE (Boston 1823)).

<sup>202</sup> Letter from James Kent to Alexander Hamilton's widow, Elizabeth Hamilton (Dec. 10, 1832), reprinted in W. KENT, MEMOIRS AND LETTERS OF JAMES KENT, L.L.D. 317 app. (1898).

<sup>203</sup> C. BINNEY, THE LIFE OF HORACE BINNEY 60 (1903).

<sup>204</sup> Letter from James Kent to Thomas Washington (n.d.), reprinted in W. KENT, *supra* note 202, at 117. The conditions in New York were described in similar terms by John Duer:

It was seldom that the opinions of the judges, even in the most important cases, were reduced to writing, and as no reports were then published, and no records preserved of the grounds on which their decisions were placed, the cases were numerous in which they had no rules to direct, no precedents to govern them.

Address by Hon. John Duer delivered before the Bar of New York (Apr. 12, 1848), quoted in W. KENT, *supra* note 202, at 112-13.

The absence of regular case reports was an important deficiency in all the states in the early years. The first volume of *Connecticut Reports* was published in 1789 by Ephraim Kirby. See REPORTS OF CASES ADJUDGED IN THE SUPERIOR COURT OF THE STATE OF CONNECTICUT FROM THE YEAR 1785, TO MAY 1788; WITH SOME DETERMINATIONS IN THE SUPREME COURT OF ERRORS (E. Kirby ed. 1789). The next volume of Connecticut reports was not published until 1806. See 1 REPORTS OF CASES, ARGUED AND DETERMINED IN THE SUPREME COURT OF ERRORS, OF THE STATE OF CONNECTICUT, IN THE YEARS 1802, 1803, AND 1804 (T. Day ed. 1806). The first Pennsylvania reports were first published in 1790 by Alexander Dallas. See 1 REPORTS OF CASES RULED AND ADJUDGED IN THE COURTS OF PENNSYLVANIA BEFORE AND

nent New Hampshire practitioner,<sup>205</sup> described in similar terms the practices of the Supreme Court of New Hampshire: "the practice and proceedings of the courts were crude and inartificial; and the final determination of causes depended more on the discretion and arbitrary opinions of the judges and jurors, than on any established rules and principles of law."<sup>206</sup> Theophilus Parsons, Jr., described the chaotic conditions of the law when his father was chief justice of the Massachusetts Supreme Judicial Court, from 1806 to 1813, noting that the court took "the opportunity which each case afforded, not only of

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SINCE THE REVOLUTION (A. Dallas ed. 1790). But his reports of decisions of the Pennsylvania courts are rather sparse after about 1796. See 2 DALL. at 270-85 (1798) (reporting 1797 Pennsylvania Supreme Court cases); 3 DALL. at 467-500 (1799) (reporting 1798-1799 Pennsylvania Supreme Court cases); 4 DALL. at 47-106 (1807) (reporting Pennsylvania High Court of Errors and Appeals cases); *id.* at 153-324 (reporting 1797-1805 Pennsylvania Supreme Court cases); *id.* at 433-72 (reporting 1806 Pennsylvania Supreme Court cases). The four volumes of Jasper Yeates' reports, covering the decisions between 1791 to 1808, did not appear until 1817. See REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF PENNSYLVANIA (J. Yeates rpt., C. Smith ed. 1817). Horace Binney began publishing what became the series of regular Pennsylvania reports in 1809. See 1 REPORTS OF CASES ADJUDGED IN THE SUPREME COURT OF PENNSYLVANIA (H. Binney ed. 1809). Reports of the decisions of New York courts were not published until 1801. See 1 CASES OF PRACTICE, ADJUDGED IN THE SUPREME COURT OF THE STATE OF NEW-YORK. (W. Coleman ed. 1801). The first volume of reports of the Massachusetts Supreme Judicial Court appeared in 1805. See 1 REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT, OF THE STATE OF MASSACHUSETTS (E. Williams ed. 1805). The first volumes of reports for Maryland and South Carolina, 1 MARYLAND REPORTS (T. Harris & J. McHenry eds. 1809); 1 REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPERIOR COURTS OF LAW IN THE STATE OF SOUTH-CAROLINA SINCE THE REVOLUTION (E. Bay ed. 1809), did not appear until 1809, and neither state had a reliable and comprehensive reporting system for several decades thereafter.

With the exception of United States Supreme Court decisions, the decisions of the federal judiciary were reported even later and more erratically than were those of the states. Justice Story's decisions on the First Circuit were published unusually promptly and completely, beginning in 1815. See 1 REPORTS OF CASES ARGUED AND DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIRST CIRCUIT (J. Gallison ed. 1815). But Story came on the bench in 1811, and no reports of the decisions of his predecessor, William Cushing, were ever published. The decisions of the extremely able Brockholst Livingston on the Second Circuit, covering the years from 1808 to 1823, were published late and incompletely. See 1 REPORTS OF CASES ARGUED AND DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SECOND CIRCUIT (E. Paine ed. 1827). None of the decisions of Livingston's predecessor, Justice William Paterson, was ever published. Justice Bushrod Washington's decisions on the Third Circuit, covering the years from 1803 to 1827, were eventually published in five volumes by Richard Peters, Jr., but the first volume did not appear until 1819. See 1 REPORTS OF CASES ARGUED AND DETERMINED IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE THIRD CIRCUIT (R. Peters ed. 1819). All of Chief Justice John Marshall's decisions on the Fifth Circuit from 1802 to 1833 are contained in 1-2 REPORTS OF CASES DECIDED BY THE HONOURABLE JOHN MARSHALL, LATE CHIEF JUSTICE OF THE UNITED STATES (J. Brockenbrough ed. 1837); reports of the Aaron Burr trial, over which Marshall presided, are collected in 1-2 REPORTS ON THE TRIAL OF COLONEL AARON BURR (D. Robertson ed. 1808). None of the decisions of Justice Samuel Chase on the Fourth Circuit or of Justice William Johnson on the Sixth Circuit was ever published in regular reports.

<sup>205</sup> See MEMOIRS OF JEREMIAH MASON 41-43 (G. Clark 2d ed. 1917).

<sup>206</sup> J. MORISON, LIFE OF JEREMIAH SMITH 210 (Boston 1845) (quoting Jeremiah Mason).

deciding that case, but of establishing rules of very general application."<sup>207</sup>

American marine insurance law was, at the outset, developed primarily in the state courts of New York. For a period of seven years — from 1800 through 1806 — the New York Supreme Court decided an average of almost twenty marine insurance cases a year, far more than in any other single category of litigation.<sup>208</sup> And, after a lull caused by the Jeffersonian embargo, the New York court decided an average of more than ten marine insurance cases a year from 1810 through 1814.<sup>209</sup> The cases dropped off after 1815 and settled down to a fairly steady pattern of about two a year by 1820.<sup>210</sup> The case reports in the other states and in the United States Supreme Court reveal a pattern of case flow and ebb similar to that in New York, although on a reduced scale.<sup>211</sup> The only relatively complete set of United States circuit court reports for this period are those of Justice Washington on the Third Circuit, which roughly correspond to this pattern of litigation.<sup>212</sup>

By about 1820, the doctrinal framework of a general American common law of marine insurance was well established. In 1821, Joseph Story, in an address to the Suffolk County Bar in Massachusetts, praised American marine insurance law in what were, even for him, extravagant terms:

The commercial law of the Atlantic states has indeed already attained to a very striking similarity in its elements. Upon the subject of insurance there is no known difference founded on local usages or statutes. If the law be differently administered, it is not, because there is any intention to deviate from the general doctrines of that law, but because the nature and extent of those doctrines have been differently understood.<sup>213</sup>

In 1829, Joseph Blunt, a New York lawyer, praised American marine insurance law in a handbook he prepared for merchants and mariners. Cribbing without acknowledgement from James Allan Park's preface to his 1797 English treatise on marine insurance, Blunt appropriated Park's words and sentiments for American law: "it is the boast of this age, that in it the great foundations of marine jurisprudence have been laid, by clearly developing the principles on which policies of

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<sup>207</sup> T. PARSONS, MEMOIRS OF THEOPHILUS PARSONS 239 (Boston 1859).

<sup>208</sup> See appendix *infra* p. 1578.

<sup>209</sup> See *id.*

<sup>210</sup> See *id.*

<sup>211</sup> See appendix *infra* pp. 1578–79.

<sup>212</sup> See appendix *infra* p. 1580.

<sup>213</sup> Address by Joseph Story delivered before the members of the Suffolk Bar, at their anniversary, at Boston (Sept. 4, 1821), reprinted in 1 AM. JURIST 1, 15–16 (1829) [hereinafter cited as Story Address].

insurance are founded . . . ."<sup>214</sup> In 1834, in the first edition of his *Commentaries on the Conflict of Laws*, Story paid perhaps the greatest, if silent, compliment to marine insurance law. In describing cases in which different rules and different jurisdictions gave rise to conflict of laws questions, Story repeatedly drew his examples from the law of negotiable instruments. Not once, in over five hundred pages, did he take an example of conflicting rules in different jurisdictions from marine insurance law.<sup>215</sup> In light of the centrifugal forces at work in the federal system, the achievement of this uniformity was little short of remarkable.

*B. The Difficulty of Maintaining the General Common Law  
in the Federal System*

Although the federal and state courts jointly administered a general common law, the nature of the federal system threatened the uniformity and continued vitality of this general body of law. The quasi-sovereignty of the states gave them autonomy in the creation and interpretation of nonfederal law. Not only were the states free to create local variations on the common law by statute; they were also free from the coordination and control of any central appellate tribunal.

The consensus among the states necessary to a workable system of general common law in the American system was already threatened in the early 1800's. In 1808, Justice Hugh Brackenridge of the Pennsylvania Supreme Court wrote a pamphlet complaining about variations from the English common law in the "American empire [that] is so peculiar in its general construction":<sup>216</sup>

In some parts of the United States an American common law has insensibly grown into existence. Those who are acquainted with the jurisprudence of our oriental States will be very sensible of the truth of this observation. Even in some of the middle States traces of a common law, variant from that of the mother country, may be found. In some of the western States the common law of England has been formally abolished. More and more difficult must it thus become, with the course of time, to ascertain, with precision, what is the

<sup>214</sup> J. BLUNT, *THE MERCHANT'S AND SHIPMASTER'S ASSISTANT; CONTAINING INFORMATION USEFUL TO THE AMERICAN MERCHANTS, OWNERS AND MASTERS OF SHIPS* 80 (New York 1829); cf. J. PARK, *supra* note 143, at xlv ("It is the boast of this age, that in it the great foundations of marine jurisprudence have been laid, by clearly developing the principles, on which policies of insurance are founded, and by happily applying those principles to particular cases.").

<sup>215</sup> See J. STORY, *supra* note 88.

<sup>216</sup> H. BRACKENRIDGE, 1 *CONSIDERATIONS ON THE JURISPRUDENCE OF THE STATE OF PENNSYLVANIA* 3 (Philadelphia 1808). Brackenridge's name is handwritten on the title page.

common law and what is not. An American becomes a stranger in his own country.<sup>217</sup>

By the 1820's, the threat to the uniformity of the general common law was widely perceived and lamented.<sup>218</sup> In his 1821 address to the Suffolk County Bar, Joseph Story noted:

[E]xcept in Louisiana, the common law is the acknowledged basis of [the states'] jurisprudence. Yet this jurisprudence, partly by statute, partly by judicial interpretations, and partly by local usages and peculiarities, is perpetually receding farther and farther from the common standard. . . . The task . . . of administering justice in the state as well as national courts, from the new and peculiar relations of our system, must be very laborious and perplexing . . . .<sup>219</sup>

In a lecture delivered at the opening of the Law Academy in Philadelphia in 1821, Peter S. Du Ponceau justified founding a new law school by citing its potential for providing a unifying force against the dangers of fragmentation. He particularly noted the lack of a central lawmaking and coordinating authority in the American system:

Our union . . . consists of twenty-three independent states, and a federal government with limited powers. Each state, within a sphere that extends to all cases of ordinary legislation, has its own legislators, and its own judiciary establishments . . . . Turn your eyes where you will, and you will find nowhere that common elevated source, whence the oracles of law may be received and diffused through the land.<sup>220</sup>

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<sup>217</sup> *Id.* at 6. Compare the following passage from the preface to the first volume of the *American Law Journal*:

If a Law Journal have been found to be so useful and necessary in Great Britain, where notoriety and uniformity may be established by an appeal to one supreme tribunal, how important would such a publication be, in our country, governed as it is by the various and conflicting laws of different states, which are yet so intimately connected by commercial and political relations?

Hall, *Preface*, 1 AM. L.J. at v, v-vi (1808).

<sup>218</sup> Peter S. Du Ponceau complained of this threat to uniformity in the *Philadelphia Freeman's Journal*:

The United States consists of eighteen distinct sovereignties, governed, indeed, (the State of Louisiana only excepted) by the same general system of law, but which has received, and is daily receiving a number of statutory modifications, which, as they are made without concert between the states that respectively adopt them, diverge more and more from the central point of uniformity.

THE JOURNAL OF JURISPRUDENCE: A NEW SERIES OF THE AMERICAN LAW JOURNAL 4 (1821) (quoting Du Ponceau from the *Philadelphia Freeman's Journal*). The passage must have been written sometime between 1811, when Louisiana, the 18th state, was admitted to the Union, and 1816, when Indiana was admitted.

<sup>219</sup> Story Address, *supra* note 213, reprinted in 1 AM. JURIST, at 13-14; see W. SAMPSON, AN ANNIVERSARY DISCOURSE DELIVERED BEFORE THE HISTORICAL SOCIETY OF NEW YORK, ON SATURDAY, DEC. 6, 1823, at 57 (2d ed. Washington, D.C., 1826) (1st ed. New York 1824). For a favorable review of the *Discourse*, see 19 N. AM. REV. 411 (1824).

<sup>220</sup> Address by Peter S. Du Ponceau delivered at the opening of the Law Academy of

William Sampson, an ardent proponent of codification, argued in 1823 that England had withstood the codification movement so long because of the "concentration of all judicial authority at Westminster."<sup>221</sup> But he contended that such a "prodigy" could

hardly be maintained in the United States, w[h]ere there are already twenty four superior, and an infinity of inferior tribunals scattered over an immense extent of territory, and where the Supreme Court of the United States has but a limited jurisdiction, embracing but a few objects of *national* concern.<sup>222</sup>

An obvious weakness of the federal system was the ability of the state legislatures to provide by statute a rule of law different from that provided by the common law. As long as its statutes did not conflict with the laws of the national government, a state was free to go its own way. The early nineteenth century debates over codification involved much more than the problems of federalism, as is illustrated by the fact that the primary inspiration for the codification movement was Jeremy Bentham, whose deep-seated hostility to the English common law was unaffected by any considerations of American federalism. But in the American setting, the codification movement had additional importance because of the federal form of government, for it carried with it the obvious threat of deviation from and consequent localization of the previously general system of common law.<sup>223</sup>

A related and equally important weakness of the federal system was the lack of a central tribunal with plenary jurisdiction over common law matters. No tribunal could prevent mistaken departures from the correct common law rule, much less forbid a state from deliberately adopting a particular local rule better suited to local conditions than the general rule. If there had been some idea in the very early years that the United States Supreme Court could fulfill such a coercive function, it soon disappeared.<sup>224</sup> The limited role of the United States Supreme Court is apparent from a letter Chief Justice Marshall sent to Congress in 1817, supporting a bill to create a regular salaried position for the Court's reporter:

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Philadelphia (Feb. 21, 1821), reprinted in *THE JOURNAL OF JURISPRUDENCE*, *supra* note 218, at 211, 214-15.

<sup>221</sup> W. SAMPSON, *supra* note 219, at 57.

<sup>222</sup> *Id.*

<sup>223</sup> For interesting perspectives on the codification movement, see J. McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 89-98 (1971); Pound, *The Place of Judge Story in the Making of American Law*, 48 AM. L. REV. 676 (1914); Note, *Swift v. Tyson Exhumed*, 79 YALE L. J. 284 (1969).

<sup>224</sup> Professor Crosskey is alone in arguing that the framers intended the Supreme Court to serve such a function. See 2 W. CROSSKEY, *supra* note 93, at 711-53.



It is a minor consideration, but not perhaps to be entirely overlooked, that, even in cases where the decisions of the Supreme Court are not to be considered as authority except in the courts of the United States, some advantage may be derived from their being known. It is certainly to be wished that independent tribunals having concurrent jurisdiction over the same subject should concur in the principles on which they determine the causes coming before them. This concurrence can be obtained only by communicating to each the judgments of the other, and by that mutual respect which will probably be inspired by a knowledge of the grounds on which their judgments respectively stand. On great commercial questions, especially, it is desirable that the judicial opinions of all parts of the Union should be the same.<sup>225</sup>

State courts generally followed common law decisions by the United States Supreme Court, but they were quite explicit in stating that they did not do so because of any legal compulsion. As Chief Justice William Tilghman of the Pennsylvania Supreme Court explained in *Waln v. Thompson* in 1822, in following an 1813 decision of the United States Supreme Court:

The decisions of the Supreme Court of the *United States* have no obligatory authority over this court, except in cases growing out of the constitution, of which this is not one. Yet so great is the importance of preserving uniformity [sic] of commercial law, throughout the *United States*; and so great the respect which I feel for the highest tribunal in the union, that I shall always be inclined to adopt its opinions, rather than those of any foreign court, unless when I am well satisfied, it is in the wrong. That is more than I can say on the present occasion . . .<sup>226</sup>

James Sullivan of Massachusetts perceived clearly the weaknesses of a federal system premised on the continued existence of the general

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<sup>225</sup> Letter from Chief Justice Marshall to Congress (Feb. 7, 1817), reprinted in 2 W. CROSSKEY, *supra* note 93, at 1246. Professor Crosskey, I must add, views the letter as politically motivated dissembling on Marshall's part. He contends that it was written "merely to procure the passage of the bill pending in Congress." *Id.* at 1245.

Crosskey contends that the Supreme Court's decision the same year in *Coolidge v. Payson*, 15 U.S. (2 Wheat.) 66 (1817), reveals that the Court's true role was as the authoritative expositor of the common law. See 2 W. CROSSKEY, *supra* note 93, at 843. The Court in *Coolidge* decided a disputed question of negotiable instruments law. Chief Justice John Marshall wrote for the Court, "It is of much importance to merchants, that this question should be at rest . . ." 15 U.S. (2 Wheat.) at 75. Henry Wheaton, the reporter, appended a note, saying, "[The decision] in the text may be considered as settling the law of the country on this subject." *Id.* at 75 n.a. This language, however, is entirely consistent with the role the Court then played in most commercial cases, for the Court frequently provided answers to common law questions, to which the state courts generally deferred. See, for example, the arguments of counsel in *Bohlen v. Delaware Ins. Co.*, 4 Binn. 430, 431-41 (Pa. 1812), discussed *infra* p. 1574.

<sup>226</sup> 9 Serg. & Rawle 115, 122 (Pa. 1822).

common law. Writing in 1801, he noted both the desirability of a uniform system of commercial law and the great vulnerability of a system of general common law dependent for its efficacy upon joint administration by the federal and state judiciaries. Because of the federal judiciary's inability under the Judiciary Act of 1789 to prevent the states from deviating from the general common law, Sullivan regarded section 34 of the Act as, at best, a "temporary provision."<sup>227</sup> He recommended

that Congress should pass a law, that the courts of the United States, and all other courts within the same, shall give to all personal contracts, made within the United States, a uniform construction, according to the tenor of the contract, and such as is usual in, and agreeable to, the proceedings of commercial nations.<sup>228</sup>

But the federal statutory solution that Sullivan hoped for never came, and the states and national government had to make do with the "temporary provision" of section 34.

Despite its obvious vulnerability to local variation, the judicial system created by the Judiciary Act of 1789 was, at the outset, relatively sensible and coherent. When the Constitution was adopted and the Judiciary Act passed, there was a large body of general law held in common by the states. The judicial system created by the Judiciary Act, although awkward, was workable as long as the state and federal courts felt that they were administering a system of general common law in whose uniformity and stability they all had an important stake. Section 34 and the *lex loci* principle it embodied remained irrelevant as long as the common law remained a system of general law. Had section 34, and the local law it referred to, become important factors in the administration of marine insurance law, this would have been a symptom of failure. That such failure never occurred is remarkable in light of the nature of the federal system within which the law was administered. In fact, the success of marine insurance law can be explained only as the result of a combination of fortunate circumstances and of a self-conscious effort by the state and federal courts to develop and maintain a uniform system of law.

*C. Developing and Maintaining an American Common Law  
of Marine Insurance in the State and Federal Courts:  
The Forces of Cohesion*

1. *The Demand for Stability and Predictability.* — The decisions of the state and federal courts from about 1800 to 1820 reveal a strong desire to establish clear rules of law in marine insurance cases and a

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<sup>227</sup> J. SULLIVAN, *THE HISTORY OF LAND TITLES IN MASSACHUSETTS* 352 (Boston 1801).

<sup>228</sup> *Id.* at 354.

great reluctance to depart from precedents established in other jurisdictions. The state and federal judiciaries' desire for a stable, predictable, and uniform system of law greatly facilitated the successful creation of a general American law merchant of marine insurance. American judges were particularly impressed by the importance of Lord Mansfield's remark in *Buller v. Harrison*: "I desire nothing so much as that all questions of mercantile law shall be fully settled and ascertained; and it is of much more consequence that they should be so, than which way the decision is."<sup>229</sup> The maxim was particularly relevant to marine insurance law. Because the participants directly established their rights and duties by private contract — unlike in negotiable instruments cases, in which liability to remote parties was usually at issue — the actual content of the substantive rules was less important than the clarity with which they were stated and understood. For if a substantive rule of marine insurance law was inconvenient to the parties in a particular transaction, they could always avoid its impact provided the rule was clear enough to give warning of its operation.

American marine insurance was not a strictly local business. Merchants from one state purchased policies from insurers in other states with enough frequency that awkward practical and legal problems would have arisen if the laws governing marine insurance had not been largely uniform from state to state. Not only would merchants and insurers (and their lawyers) have had to be familiar with other states' laws in order to carry on interstate insurance transactions; in addition, lawsuits on such insurance policies would have involved choice of law problems that would have increased the complexity of litigation and, at the same time, almost certainly decreased the predictability of its outcome.

The paramount importance to merchants and underwriters that rules be clear, settled, and uniform was repeated over and over again. As District Judge Richard Peters asserted: "To be respectable abroad, and to facilitate and simplify mercantile business at home, we should have a national, uniform and generally received law merchant."<sup>230</sup> After noting the importance of establishing a stable and uniform American rule on the question of double insurance posed by the case before him, Peters added:

I cannot see, that it will be materially disadvantageous to commerce, to settle this question, in either way contended for in this cause. It

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<sup>229</sup> *Buller v. Harrison*, 98 Eng. Rep. 1243, 1244 (K.B. 1777); see also *Vallejo v. Wheeler*, 98 Eng. Rep. 1012, 1017 (K.B. 1774) (Mansfield, J.) ("In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know which ground to go upon.").

<sup>230</sup> *Thurston v. Koch*, 4 U.S. (4 Dall.) 348, 352 (1800).

is of most importance, that the point should be clearly decided and settled in one or the other way; that merchants may know, and accommodate their affairs to the decision.<sup>231</sup>

Bushrod Washington, sitting as a circuit judge in *Calbreath v. Gracy*, recognized in his characteristically straightforward fashion the importance of settling a question quickly: "This is a new clause, which has been introduced into policies of insurance by some underwriters, within a few years past. The sooner it receives a construction the better."<sup>232</sup>

In addition, the judges frequently repeated that once a rule was settled it should not be changed lightly. In *Hallet v. Columbian Insurance Co.*, the New York Supreme Court wrote, "A rule of commercial law, when once settled, ought not to be disturbed, even though the reason of it may be justly questioned. Uniformity of decision is of more importance in such cases than accuracy of reasoning."<sup>233</sup> And the Massachusetts Supreme Judicial Court, in *Nickels v. Maine Fire & Marine Insurance Co.*, emphasized the importance of adhering to established rules: "If this were a new question, the argument for the plaintiff would be entitled to great consideration. But the practice is settled and universal. . . . It is of importance, particularly in commercial causes, to adhere to general rules."<sup>234</sup> This conservatism frequently prevailed even when a judge believed that the rule he was applying was unsound. For example, in *Groning v. Union Insurance Co.*, Justice Abraham Nott of the Constitutional Court of South Carolina followed the established rule on the evidentiary effect of a foreign admiralty decree although he thought the rule wrong on the merits:

My mind has undergone no change with regard to the correctness of the rule: But it is one, the importance of which depends more on its being settled, known and uniform, than the manner how settled. The parties know the mutual risks which they have to run, and may obviate the difficulty by express stipulation as is now often done.<sup>235</sup>

## 2. The Early Years: Parallel Development from Common Sources.

— (a) *The English Legacy.* — A short sketch of the development of marine insurance law in England is a necessary prelude to understand-

<sup>230</sup> *Thurston v. Koch*, 4 U.S. (4 Dall.) 348, 352 (1800).

<sup>231</sup> *Id.* at 352a. In *Tom v. Smith*, 3 Cai. R. 245 (N.Y. Sup. Ct. 1805), Justice Livingston of the New York Supreme Court stated:

This is a case of some novelty, on which precedents throw little, if any light. It is very probable, therefore, that our view of it may be incorrect, but after mature reflection, we cannot come to any other result, satisfactory to our own minds. If wrong, the precedent will not work much mischief, for it cannot be long before underwriters, in this state at least, discover the folly of insuring, unless at a very advanced premium, either profits or freight.

*Id.* at 251.

<sup>232</sup> 4 F. Cas. 1030, 1031 (C.C.D. Pa. 1805) (No. 2296).

<sup>233</sup> 8 Johns. 272, 276 (N.Y. Sup. Ct. 1811).

<sup>234</sup> 11 Mass. 253, 254 (1814).

<sup>235</sup> *Groning v. Union Ins. Co.*, 10 S.C.L. (1 Nott & McC.) 537, 540 (1819).

ing the subsequent development of a uniform common law of marine insurance in the American federal system. Marine insurance was a late arrival in English law. Although there appears to have been marine insurance litigation as early as the reign of Elizabeth I,<sup>236</sup> there were relatively few reported cases until the second half of the eighteenth century. Then, during a span of about forty years beginning in the 1750's, when Lord Mansfield took the bench, the English courts developed a large and relatively coherent body of marine insurance law.<sup>237</sup> Much of the English law was borrowed from the continent, particularly from France, and much of it was based on mercantile customs shared by the trading nations of western Europe. William Blackstone referred to the law merchant, including marine insurance law, as a "great universal law, collected from history and usage" — one that had been "adopted in it's [sic] full extent by the common law."<sup>238</sup>

When Lord Mansfield was reaching the end of his career, his protégé, James Allan Park,<sup>239</sup> collected all Mansfield's marine insurance decisions in a treatise, *A System of the Law of Marine Insurances*,<sup>240</sup> which he published in 1787. In the preface, Park praised Mansfield's accomplishment in the words that Joseph Blunt later found so irresistible: "It is the boast of this age, that in it the great foundations of marine jurisprudence have been laid, by clearly developing the principles, on which policies of insurance are founded, and by happily applying those principles to particular cases."<sup>241</sup> Park's treatise proved immensely popular in both England and the United States.<sup>242</sup> In later life, Joseph Story recalled the American reception: "[Park's] work on insurance was published only a few years before I came to the Bar; and I well remember the high favor with which it was then received, and the strong relish with which I read it forty years ago."<sup>243</sup> In 1802, Samuel Marshall brought out a second English

<sup>236</sup> See Mears, *The History of the Admiralty Jurisdiction*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LAW 312, 353-54 (Ass'n of Am. Law Schools ed. 1908).

<sup>237</sup> See generally C. FIFOOT, LORD MANSFIELD (1936) (recounting Mansfield's judicial career).

<sup>238</sup> 4 W. BLACKSTONE, *supra* note 19, at \*67. "Thus in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to." *Id.*

<sup>239</sup> Professor Goebel notes that "Park was only twenty-four years of age when his book appeared, and as the commentary is often sage, one suspects that Mansfield may have helped in the framing." 2 J. GOEBEL, *THE LAW PRACTICE OF ALEXANDER HAMILTON* 430 (1969); see also F. MARTIN, *HISTORY OF LLOYD'S AND OF MARINE INSURANCE* 122 (1876) (stating that Mansfield "revised the work").

<sup>240</sup> J. PARK, *A SYSTEM OF THE LAW OF MARINE INSURANCES* (London 1787).

<sup>241</sup> J. PARK, *supra* note 143, at xlv.

<sup>242</sup> By 1817, 31 years after its first appearance, Park's treatise had gone through seven English editions. See J. PARK, *A SYSTEM OF THE LAW OF MARINE INSURANCES* (7th ed. London 1817) (1st ed. London 1787).

<sup>243</sup> Letter from Joseph Story to James J. Wilkinson, Esq., of London (Jan. 22, 1839), reprinted in 2 W. STORY, *supra* note 5, at 310-11.

treatise that, at least in the United States, came to rival Park's treatise.<sup>244</sup>

Thus, the development of the American law of marine insurance began just as the English were consolidating nearly a half-century of jurisprudential achievements in marine insurance cases. They bequeathed to the Americans the concept of a general law merchant, described and endorsed by Blackstone. And equally important, they bequeathed an actual law merchant of marine insurance, developed by the greatest commercial judge England had ever known and capably systematized in two widely available treatises. Beginning in the 1790's, marine insurance became, for the first time, an American as well as an English business. In the American insurance boom that followed, the recently created English law provided the common basis for marine insurance law decisions in all American jurisdictions. But instead of the largely unitary English system, the dual — or, more accurately, multiple — judicial system of American federalism was the custodian of this general system of the law merchant.

*(b) American Adoption of English and Other Foreign Sources.* — Because the law of marine insurance was developed and administered in relatively few states, achieving uniformity was considerably easier than it otherwise might have been. Of those states, only New York, Pennsylvania, and Massachusetts had courts whose decisions were consistently important in shaping marine insurance law. The decisions of Maryland and South Carolina, the other two states with major ports, were poorly reported and largely unimportant.<sup>245</sup> Coordination problems were thus enormously reduced compared to what they would have been if thirteen, and soon more than twenty, states had been involved in making law in the area. Probably more important, in marine insurance law — unlike in negotiable instruments law, in which debtor and creditor states had conflicting interests — there were no regional or economic differences that exerted pressures on states to develop different substantive rules to serve particular state interests.

The marine insurance law developed in New York was particularly influential. Its influence resulted from a combination of circumstances: the greatest quantity of marine insurance litigation was in New York; the formidable James Kent was associate and then chief justice of the Supreme Court during the critical formative period from 1798 to

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<sup>244</sup> See S. MARSHALL, A TREATISE ON THE LAW OF INSURANCE (London 1802). It was reprinted in the United States in 1805, see S. MARSHALL, A TREATISE ON THE LAW OF INSURANCE (Boston 1805), and was published in a specifically American version in 1810, into which J.M. Condry of Philadelphia incorporated note references to over one hundred American cases, see S. MARSHALL, A TREATISE ON THE LAW OF INSURANCE (J. Condry ed. 1810) (usually referred to by contemporaries as *Condry's Marshall*).

<sup>245</sup> See *supra* note 204.

1814;<sup>246</sup> and, quite simply, New York was the first state to publish substantial quantities of its decisions.<sup>247</sup> On their surface, the early New York cases reveal less dependence on English law than one might expect. In the brief reports characteristic of New York cases from roughly 1800 to 1805, citation of authority was relatively rare. After James Kent had taken a firm grip on the New York Supreme Court, citations to English cases and to Park's and Marshall's treatises began to appear. But these references were frequently supplemented, and sometimes overshadowed, by citations to the two great French treatises on marine insurance law written by Balthazard Emérigon and René Valin.<sup>248</sup> While this reliance on French law was in part genuine, it was also in part merely a means for Kent to import into New York law the general law merchant of the international community, to which English law largely conformed.

In these early years, there was considerable anti-English and anti-common law sentiment among the New York Republicans, many of whom were on the state bench. It was therefore unwise for those who wished to persuade these Republican judges to decide in their favor to rely too heavily on English authorities. James Kent — a strong Federalist with no such anti-English or anti-common law bias — often dealt with this problem by citing the French authorities in support of the results he wished to reach. As he recounted it after he had retired:

When I came to the Bench . . . I read . . . Valin and Emerigon, and completely abridged the latter, and made copious digests of all the English law reports and treatises as they came out . . . [A]s the judges (Livingston excepted) knew nothing of French or civil law, I had immense advantage over them. I could generally put my brethren to rout and carry my point by my mysterious wand of French and civil law. The judges were Republicans and very kindly disposed to everything that was French, and this enabled me, without exciting any alarm or jealousy, to make free use of such authorities and thereby enrich our commercial law.<sup>249</sup>

The New York reports of this period suggest that Kent may have overdrawn the picture slightly but that his recounting was essentially

<sup>246</sup> Kent was Associate Justice from 1798 until 1804 and Chief Justice from 1804 until 1814. See J. HORTON, *JAMES KENT: A STUDY IN CONSERVATISM* 149-96 (1939). He was then Chancellor of New York from 1814 until 1823. See *id.* at 197-263.

<sup>247</sup> See *supra* note 204.

<sup>248</sup> B. EMÉRIGON, *TRAITÉ DES ASSURANCES ET DES CONTRATS A LA GROSSE* (Marseille 1783); R. VALIN, *NOUVEAU COMMENTAIRE SUR L'ORDONNANCE DE LA MARINE* (La Rochelle 1766).

<sup>249</sup> Letter from James Kent to Thomas Washington (n.d.), reprinted in W. KENT, *supra* note 202, at 117. This letter is reprinted in its entirety in 1 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 837 (Ass'n of Am. Law Schools ed. 1907), but Kent's phrase "wand of French and civil law" is rendered as "want of French and civil law," *id.* at 843.

accurate. French law was generally used as a source of analogies, or of rules of decision when English or New York law was unclear, rather than as the primary and controlling reference; but the occasions for relying on French law were relatively frequent.<sup>250</sup> And Brockholst Livingston — later appointed to the United States Supreme Court — was the only justice on the New York court ever to disagree with Kent on the interpretation of French law.<sup>251</sup>

Because the New York reports were not published until 1801 and were not widely available in other states until several years later, the influence of New York on other states was not felt until sometime between 1805 and 1810, depending on the state. Until then, the other states were on their own, as New York was, to adopt or adapt the English and continental law as they thought best. The Massachusetts Supreme Judicial Court had much less difficulty than the New York court had in openly acknowledging a dependence on English law. In the first reported marine insurance case in Massachusetts, *Livermore v. Newburyport Marine Insurance Co.*<sup>252</sup> in 1804, counsel for the insurer relied heavily on Marshall's treatise and on an English case<sup>253</sup> in convincing the court that the shipowner had not made a timely abandonment of his vessel to the underwriters.<sup>254</sup> In the second reported case, a year later, Marshall's treatise was again the primary authority.<sup>255</sup> And in *Amory v. Gilman*<sup>256</sup> in 1806, Justice Theodore Sedgwick left no doubt about the court's attitude toward the English treatise writers: Park, he wrote, "has considered the subject of insurance with profound intelligence," and Marshall "in his treatise displays a vigorous understanding and mature judgment."<sup>257</sup> The Pennsylvania Supreme Court followed English cases and treatises readily; in its 1795 decision in *Fuller v. M'Call*,<sup>258</sup> for example, it repeatedly referred to Park's treatise and to English decisions.<sup>259</sup> The high courts

<sup>250</sup> See, e.g., *Bradhurst v. Columbian Ins. Co.*, 9 Johns. 9, 15-16 (N.Y. Sup. Ct. 1812); *Mumford v. Commercial Ins. Co.*, 5 Johns. 262, 267-68 (N.Y. Sup. Ct. 1810); *Hoyt v. Wildfire*, 3 Johns. 518, 520-21 (N.Y. Sup. Ct. 1808); *Griswold v. New-York Ins. Co.*, 3 Johns. 321, 329-30 (N.Y. Sup. Ct. 1808); *Smith v. Williams*, 2 Cai. Cas. 110, 121-24 (N.Y. 1805).

<sup>251</sup> Compare *Walden v. Le Roy*, 2 Cai. R. 263, 265-66 (N.Y. Sup. Ct. 1805) (Kent, J.), with *id.* at 273 (Livingston, J., dissenting); compare *Lawrence v. Sebor*, 2 Cai. R. 203, 207 (N.Y. Sup. Ct. 1804) (Livingston, J.), with *id.* at 208-09 (Kent, J., dissenting).

<sup>252</sup> 1 Mass. 264 (1804).

<sup>253</sup> *Hamilton v. Mendes*, 97 Eng. Rep. 787 (K.B. 1761).

<sup>254</sup> See *Livermore*, 1 Mass. at 269-72.

<sup>255</sup> See *Porter v. Bussey*, 1 Mass. 436, 440-41 (1805).

<sup>256</sup> 2 Mass. 1 (1806). The court followed a principle laid down in the preamble to an English statute because the principle was applicable "equally to this and every other civilized and well-governed commercial country." *Id.* at 13.

<sup>257</sup> *Id.* at 11.

<sup>258</sup> 1 Yeates 464 (Pa. 1795).

<sup>259</sup> See *id.* at 465-69.



of Maryland<sup>260</sup> and South Carolina<sup>261</sup> likewise relied heavily upon English authorities.

Marine insurance litigation in the federal courts was virtually indistinguishable from that in the state courts, except for the jurisdictional requirement of diversity of citizenship. Chief Justice Marshall, as was his habit, cited authority only infrequently in his opinions. But when the first marine insurance cases began coming to the Supreme Court in 1803 and 1804, it was apparent from the arguments of counsel and from the Court's decisions that the bench and bar relied heavily on the English cases and treatises.<sup>262</sup> The reports of the circuit decisions of Justice Washington — who in these early years appears to have decided the most marine insurance cases of any Supreme Court Justice on circuit — further demonstrate this early reliance on English law. For example, in *M'Gregor v. Insurance Co. of Pennsylvania*<sup>263</sup> in 1803, William Rawle cited Marshall and Park in his argument to Washington that a particular usage of trade should prevail; and his opponent cited Park in his argument that the usage should *not* prevail.<sup>264</sup>

It is not surprising that in these early years the law generated in the various state and federal courts was fairly uniform. For even though American courts did not have access to the decisions of coordinate American jurisdictions until roughly 1805, all the courts were working from a common source. Because the arguments on both sides of the case were usually framed in terms of the meaning of Mansfield's decisions, of Park's and Marshall's treatises, and occasionally of Emérigon's and Valin's treatises, the law that developed in all jurisdictions was very similar. Perhaps it could not have continued that way over an extended period, but beginning about 1805, or shortly thereafter, the general availability of case reports gave the different jurisdictions the ability to coordinate their decisions. Decisions in insurance cases were thereafter no longer dependent for their uniformity merely on parallelism of independent reasoning from common sources, for the courts now began to check and to correct their results against those reached in the other jurisdictions.

3. *Self-Conscious Coordination Among the State and Federal Courts.* — (a) *Coordination Among State Courts.* — Conscious coordination among different jurisdictions is first apparent in decisions by the Massachusetts and Pennsylvania courts, which looked to and

<sup>260</sup> See, e.g., *Kennedy v. Baltimore Ins. Co.*, 3 H. & J. 367, 368–69 (Md. 1813); *Carrere v. Union Ins. Co.*, 3 H. & J. 324, 328 (Md. 1813).

<sup>261</sup> See, e.g., *Trenholm v. Alexander*, 4 S.C.L. (2 Brev.) 238, 240–41 (1808); *Cross v. Shutcliffe*, 2 S.C.L. (2 Bay) 220, 221–22 (1799).

<sup>262</sup> See, e.g., *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 199 (1804); *Marine Ins. Co. v. Young*, 5 U.S. (1 Cranch) 332, 335 (1803).

<sup>263</sup> 16 F. Cas. 129 (C.C.D. Pa. 1803) (No. 8811).

<sup>264</sup> See *id.* at 129.

usually followed the decisions of New York. For example, in *Oliver v. Newburyport Marine Insurance Co.*<sup>265</sup> in 1807, the Massachusetts Supreme Judicial Court followed the New York rule that the policyholder was entitled to receive only an indemnification from the underwriter when the master had purchased the vessel after a condemnation by a foreign admiralty court. Justice Sedgwick's words are fairly representative of the attitude of the Massachusetts court:

[The case referred to] was determined before the supreme court of the State of *New-York* — a court very respectable for learning and talents, and much conversant in questions of insurance. . . . [I]t would be with much reluctance that I should feel myself bound to establish a rule, upon a subject so important as that of insurance, in opposition to one I found already established in a contiguous state so commercial as that of *New-York*, and established by judges so respectable as I know them to be.<sup>266</sup>

Throughout the first quarter of the nineteenth century, all states deciding marine insurance cases continued to give great deference to the decisions of New York. *Coolidge v. Gloucester Marine Insurance Co.*,<sup>267</sup> decided by the Massachusetts Supreme Judicial Court in 1819, is fairly typical of a later case continuing this practice. In deciding whether an abandonment to the underwriter was timely, the court noted that, although the particular question presented had not been settled in English or Pennsylvania courts, "the Courts in *New York* have, and we think rightly, decided upon the principles which have governed our decision."<sup>268</sup>

<sup>265</sup> 3 Mass. 37 (1807).

<sup>266</sup> *Id.* at 64–65. On those infrequent occasions when a state court failed to follow New York's lead, this failure provided ammunition for dissenters. For example, in *Insurance Co. of N. Am. v. Jones*, 2 Binn. 547 (Pa. High Ct. Err. & App. 1807), the Pennsylvania High Court of Errors and Appeals reversed a decision by the Pennsylvania Supreme Court holding that seamen's wages during an embargo were "general average" (and hence chargeable against the entire vessel and cargo) rather than deductible from the freight earned. *See id.* at 557. The dissent appealed to New York authority, as well as to that of the Pennsylvania Supreme Court:

Judge *Livingston*, now of the Supreme Court of the *United States* [but at the time of the decision on the New York Supreme Court], acknowledged to be well versed in the knowledge of commercial law, appears to have entertained the same opinion, as well as the learned bench of the Supreme Court of *New York*, and that of our own.

*Id.* at 573 (Young, Pres., dissenting).

<sup>267</sup> 15 Mass. 341 (1819).

<sup>268</sup> *Id.* at 347 (footnote omitted). On those few occasions when the other state courts established a rule at variance from that of New York, those courts felt obliged to explain and justify such a course of action. *See, for example, Lapsley v. Pleasants*, 4 Binn. 502 (Pa. 1812), in which Chief Justice William Tilghman, in refusing to follow a New York decision, pointed out that New York had departed from the old rule:

[The New York case] is to the point, and I should have been glad if I could have seen clear reason for agreeing with it. I am sensible of the convenience of uniformity of decision in the *United States*, and no man has a higher respect than myself, for Chief

As reports of all the major commercial states became regularly available, Pennsylvania and Massachusetts joined New York as states whose decisions had important precedential value. *Allegre's Administrators v. Maryland Insurance Co.*,<sup>269</sup> decided by the Court of Appeals of Maryland in 1830, typifies a later case that followed the decisions of a major commercial state other than New York. After emphasizing the importance of coordination among the states and uniformity of decision, the Maryland court followed the rule established in Massachusetts:

[U]niformity of decision among the several States of the Union, on subjects of this nature, is of vast importance to the mercantile community; and that consideration alone, in the absence of all motive or obligation to embrace a contrary doctrine, should induce us to sanction the principle established in [Massachusetts,] one of the most enlightened and commercial States in the Union . . . .<sup>270</sup>

Around 1810, the New York Supreme Court in its turn began to cite and rely on decisions in other American jurisdictions. American cases supplemented, and in time virtually replaced, the English and French authorities upon which New York courts had previously relied. In *Haff v. Marine Insurance Co.*,<sup>271</sup> in 1811, for instance, the court took note of two Pennsylvania cases: "[The Pennsylvania cases] are in point; and if the case were otherwise doubtful, those decisions deserve great weight."<sup>272</sup> In only a few cases did New York fail to follow the other states. For example, in *Gracie v. New-York Insurance Co.*,<sup>273</sup> also decided in 1811, Kent discussed and refused to follow<sup>274</sup> an 1803 Pennsylvania case, *Watson v. Insurance Co. of North America*.<sup>275</sup> But the Pennsylvania Supreme Court itself soon thereafter repudiated *Watson* as inconsistent with established principles of general law.<sup>276</sup> The New York court's decision in *Gracie* and the later Pennsylvania decision overruling *Watson* therefore illustrate not coordination, but rather the different yet related point that all the states, even in those cases where they did not automatically follow each other, continued to follow a general common law of marine insurance that in many instances provided more or less settled answers.

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Justice Kent, and the Supreme Court of New York. But it does appear to me, that a departure from the ancient rule may be attended with inconveniences greater than those which will result from an adherence to it.

*Id.* at 511-12.

<sup>269</sup> 2 G. & J. 136 (Md. 1830).

<sup>270</sup> *Id.* at 163.

<sup>271</sup> 8 Johns. 163 (N.Y. Sup. Ct. 1811) (per curiam).

<sup>272</sup> *Id.* at 167.

<sup>273</sup> 8 Johns. 237 (N.Y. Sup. Ct. 1811).

<sup>274</sup> See *id.* at 245.

<sup>275</sup> 1 Binn. 47 (Pa. 1803).

<sup>276</sup> See *Brown v. Phoenix Ins. Co.*, 4 Binn. 445, 464-65, 478 (Pa. 1812).

(b) *The Unifying Effect of State Court Deference to Decisions of the Federal Courts.* — Shortly before 1810, the state courts also began to cite and to follow decisions by the United States courts. Justice Washington's circuit opinions, to the extent they were available, were influential in all the states as well-respected expositions of the general law. The Pennsylvania Supreme Court followed Washington's decisions more frequently than did other state courts, probably because his circuit decisions in insurance cases were virtually all rendered in Philadelphia. Although his decisions were badly reported for a number of years,<sup>277</sup> the Philadelphia bar was so small that the decisions were often preserved and relied upon in argument before the Pennsylvania Supreme Court even without the assistance of formal case reports.<sup>278</sup> For example, in *Amroyd v. Union Insurance Co.*,<sup>279</sup> the Pennsylvania Supreme Court followed Justice Washington's then-unreported decision in *Watson v. Insurance Co. of North America*,<sup>280</sup> and in *Gray v. Waln*,<sup>281</sup> the Pennsylvania court followed his opinion in *Caze v. Reilly*<sup>282</sup> rather than a contrary opinion of the New York Supreme Court.<sup>283</sup>

The New York Supreme Court, in *M'Bride v. Marine Insurance Co.*<sup>284</sup> in 1810, followed Justice Washington's 1808 decision in *Odlin*

<sup>277</sup> Before Justice Washington's decisions began to be regularly reported, his opinions became known in various ways. Some decisions were preserved informally by members of the Philadelphia bar; some were published in footnotes to Pennsylvania Supreme Court opinions in the Pennsylvania reports, see, e.g., *Gray v. Waln*, 2 Serg. & Rawle 229, 237 n.(a) (Pa. 1816) (printing Washington's opinion in *Caze v. Richards & Reilly*, now reported as *Caze v. Reilly* 5 F. Cas. 332 (C.C.D. Pa. 1814) (No. 2538)); *Calhoun v. Insurance Co. of Pa.*, 1 Binn. 293, 296 n.(a) (1808) (printing the opening paragraph of Washington's opinion in *Calbraith v. Gracie*, now reported in full as *Calbreath v. Gracy* [sic], 4 F. Cas. 1030 (C.C.D. Pa. 1805) (No. 2296)). Some opinions were published or summarized in newspapers, see, e.g., *Dorr v. New Eng. Marine Ins. Co.*, 4 Mass. 221, 225 (1808) (note of a case "contained in a newspaper" read in court). A few opinions were published in John Hall's *American Law Journal*, see, e.g., *Odlin v. Insurance Co. of Pa.*, 2 AM. L.J. 221 (1808) (now reported at 18 F. Cas. 583 (C.C.D. Pa. 1809) (No. 10,433)), and some decisions were summarized as notes in J.M. Condy's edition of Marshall's treatise, see, e.g., S. MARSHALL, TREATISE ON THE LAW OF INSURANCE 321 n.49, 331a n.52 (J. Condy ed. 1810).

<sup>278</sup> See *supra* note 277.

<sup>279</sup> *Amroyd v. Union Ins. Co.*, 2 Binn. 394 (Pa. 1810).

<sup>280</sup> The decision is now reported at 29 F. Cas. 431 (C.C.D. Pa. 1808) (No. 17,284). Note that this is a different case from the Pennsylvania case of the same name discussed *supra* p. 1571 and reported at 1 Binn. 47 (1803).

<sup>281</sup> 2 Serg. & Rawle 229 (Pa. 1816).

<sup>282</sup> 5 F. Cas. 332 (C.C.D. Pa. 1814) (No. 2538).

<sup>283</sup> See *Bradhurst v. Columbian Ins. Co.*, 9 Johns. 9 (N.Y. Sup. Ct. 1812). The high esteem in which Justice Washington's opinions were held is suggested by the fact that the reporters, Thomas Sergeant and William Rawle, reproduced Washington's opinion in *Caze v. Richards & Reilly* in a footnote in the Pennsylvania reports, with the notation that they were "convinced that they will receive the thanks of the profession" for doing so. *Gray v. Waln*, 2 Serg. & Rawle 229, 237, n.(a) (Pa. 1816).

<sup>284</sup> 5 Johns. 299 (N.Y. Sup. Ct. 1810).

*v. Insurance Co.*,<sup>285</sup> which was then published only in John Hall's *American Law Journal*.<sup>286</sup> Writing for the New York court, Chief Justice Kent stated:

Judge *Washington* went through all the cases that bear upon the question, and examined it, upon principles of law and public policy . . . . After the clear and masterly view of the subject which was taken in that case, it becomes unnecessary to examine it here at large; and I think that I need not do much more than to declare that I yield my full assent to that opinion.<sup>287</sup>

In 1819, the Constitutional Court of South Carolina, in *Lorent v. South Carolina Insurance Co.*,<sup>288</sup> also praised and followed Washington's decision in *Odlin* and noted along the way that the New York Supreme Court had done so as well:

[Judge Washington] has ably considered the policy and convenience of the doctrine in support of his conclusion . . . . And thus, to conspiring opinions from abroad, we may add the *fixed law* of New York, and the *probable law* of the Courts of the United States.

Comity, and the spirit of uniformity, it appears to me, would urge us to add our assenting voice; provided there be no distortion of reason or breach of principle in the accession . . . .<sup>289</sup>

But deference to decisions of United States Supreme Court Justices on circuit was, in the words of the South Carolina court, deference only to the "probable law of the courts of the United States," for the Supreme Court had the final say on how the national courts would decide questions of general law. From 1803 to 1840, the United States Supreme Court decided fifty-three marine insurance cases that had originally been brought in the diversity jurisdiction of the circuit courts.<sup>290</sup> When one of these Supreme Court decisions was available and on point, the state courts rarely failed to follow its holding. For example, in *Russell v. New England Marine Insurance Co.* in 1808,<sup>291</sup> the Massachusetts Supreme Judicial Court followed the United States Supreme Court's decision in *Graves v. Boston Marine Insurance Co.*<sup>292</sup> Chief Justice Parsons' one-paragraph opinion cited the *Graves* case as the sole authority.<sup>293</sup> Later that year, when a similar question came

<sup>285</sup> 18 F. Cas. 583 (C.C.D. Pa. 1808) (No. 10,433).

<sup>286</sup> See 2 AM. L.J. 221 (1809).

<sup>287</sup> *M'Bride*, 5 Johns. at 307. Other New York Supreme Court cases in which decisions by Justice Washington were followed include *Kane v. Commercial Ins. Co.*, 8 Johns. 229 (N.Y. Sup. Ct. 1811), and *Craig v. United Ins. Co.*, 6 Johns. 226 (N.Y. Sup. Ct. 1810).

<sup>288</sup> 10 S.C.L. (1 Nott & McC.) 505 (1819).

<sup>289</sup> *Id.* at 509.

<sup>290</sup> See *supra* note 122.

<sup>291</sup> 4 Mass. 82 (1808).

<sup>292</sup> 6 U.S. (2 Cranch) 419 (1805).

<sup>293</sup> See *Russell*, 4 Mass. at 84.

up in *Dumas v. Jones*, the Massachusetts court again followed *Graves*: "This decision [*Graves*] being had by the highest judicial tribunal, upon a subject on which it is desirable there should be uniformity throughout the *United States*, this Court would not be disposed lightly to question it."<sup>294</sup>

The argument of counsel before the Pennsylvania Supreme Court in *Bohlen v. Delaware Insurance Co.*<sup>295</sup> in 1812 reveals the importance attached to the decisions of the United States Supreme Court in marine insurance cases. The question was whether abandonment of a vessel was timely if the insured did not abandon immediately upon learning of its capture, but instead waited to see if the vessel would be condemned by a prize court. In 1807, the United States Supreme Court had held in *Rhineland v. Insurance Co. of Pennsylvania*<sup>296</sup> that the owner of an ostensibly neutral vessel could abandon upon capture without waiting to see if the vessel would be condemned. During argument in *Bohlen*, counsel for the plaintiffs stated:

Until the case of *Rhineland v. The Insurance Company of Pennsylvania* in 1807, [the insured] did not know that he was intitled to abandon upon capture; and from that day to this, the underwriters, who are now insisting upon a prompt abandonment, have by the instrumentality of special clauses, one of which is in this policy, constantly exerted themselves to postpone, instead of accelerating this step.<sup>297</sup>

From counsel's statement that the insured "did not know that he was intitled to abandon upon capture" until the decision in *Rhineland*, it is apparent that Marshall's opinion was taken by merchants and underwriters in Philadelphia to have settled the matter.<sup>298</sup>

Although it was clear that the state courts were under no legal compulsion to follow the decisions of the United States Supreme Court, they were invariably pleased when their analyses and results coincided with the Court's. As Justice Hugh Brackenridge of the Pennsylvania Supreme Court said in *Calhoun v. Insurance Co. of Pennsylvania*<sup>299</sup> in 1808, in following the United States Supreme

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<sup>294</sup> *Dumas v. Jones*, 4 Mass. 646, 652 (1808). For another example of a state court's following the Supreme Court's lead on a question of marine insurance law, see *Maryland Ins. Co. v. Graham*, 3 H. & J. 62, 69 (Md. 1810) in which the judgment of the Maryland Court of Appeals was in accordance with the United States Supreme Court's decision in *Maryland Ins. Co. v. Ruden*, 10 U.S. (6 Cranch) 338 (1810).

<sup>295</sup> 4 Binn. 430 (Pa. 1812).

<sup>296</sup> 8 U.S. (4 Cranch) 29 (1807).

<sup>297</sup> *Bohlen*, 4 Binn. at 434-35 (footnote omitted).

<sup>298</sup> It was Chief Justice Marshall's hope, and probably his expectation, that his opinion would be considered dispositive. He had stated explicitly in *Rhineland* that the case involved "important questions to the commercial interest of the United States [that] ought to be settled with as much clearness as the case admits." 8 U.S. (4 Cranch) at 41.

<sup>299</sup> 1 Binn. 293 (Pa. 1808).

Court's decision in *Fitzsimmons v. Newport Insurance Co.*<sup>300</sup> in that same year:

[My construction] is supported by the recent decision of the Supreme Court of the *United States* . . . and it is some evidence of the justness of my construction, that I had not any knowledge of that report when I prepared the foregoing on this point. Different minds without communication thinking the same thing, furnishes a proof in favour of the deduction.<sup>301</sup>

And in doubtful cases, a United States Supreme Court decision on point generally proved decisive. For example, in *Thompson v. Read*,<sup>302</sup> the Supreme Court of Pennsylvania was faced with a question on which the courts of New York and Massachusetts had disagreed: "Between such respectable authorities of our own country, it would be hard and unpleasant to decide, were we not relieved by a decision of the Supreme Court of the *United States*, which turns the scale."<sup>303</sup>

In sum, the state courts considered themselves, other state courts, and the federal courts to be engaged in precisely the same enterprise: deciding cases under, and developing a system of, general common law. In this process, the United States Supreme Court had no more legal authority over the Supreme Court of Pennsylvania than did, say, the Supreme Court of New York. But the decisions of the United States Supreme Court were nonetheless treated with unusual deference. Even if the Court had no legal authority over the state courts on questions of general common law, it had a prominent, central, and respected position in the American legal system. Moreover, as a practical matter, the United States circuit courts were obliged to follow the decisions of the United States Supreme Court on questions of general common law, which meant that the circuit courts sitting in the states would in any event be following the rules laid down by the United States Supreme Court. Thus, although the decisions of the United States Supreme Court were not in any legal sense *suprême*, the Court was nonetheless *primus inter pares*. This preeminent role was filled by the Supreme Court and facilitated by the circuit courts in marine insurance cases without objection by the state courts. It was obvious to both the state and federal courts that in these cases they were serving common ends by developing a uniform body of marine insurance law that could serve as a general common law — if not of the United States, at least *for* the United States.

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<sup>300</sup> 8 U.S. (4 Cranch) 110, 185 (1808).

<sup>301</sup> *Calhoun v. Insurance Co. of Pa.*, 1 Binn. 293, 316 (Pa. 1808).

<sup>302</sup> 12 Serg. & Rawle 440 (Pa. 1820).

<sup>303</sup> *Id.* at 444. The United States Supreme Court decision was *Olivera v. Union Ins. Co.*, 16 U.S. (3 Wheat.) 183 (1818), which is discussed *supra* pp. 1544-45.

## III. CONCLUSION

During the formative period of American marine insurance law from about 1800 to 1820, the state and federal courts created a remarkably uniform American law of marine insurance. Although there were differences among the various courts on some questions, the overwhelming majority of cases involved the articulation and application of rules that all American jurisdictions held in common. And although the state and federal courts disagreed from time to time over the precise content of the general law of marine insurance, all courts agreed that they were administering a general law. In none of the marine insurance cases decided by the federal courts during this period, even in those few in which a particular question had been decided differently in different states, was it argued that a federal court should follow local law or that section 34 of the Judiciary Act of 1789 was in any way relevant to its decision.

Yet one should not conclude from the American courts' success in creating this body of marine insurance law that the American federal system facilitated the result. Quite the opposite appears to be true. The *lex loci* principle embodied in section 34 of the Judiciary Act posed a constant threat to the successful creation and administration of any system of general common law. While such a system of common law could accommodate a few anomalies, it could not tolerate very many without their undermining the integrity and even the concept of a general law. But section 34 and the *lex loci* principle never became more than a threat to marine insurance law. For as long as American courts thought that part of their legitimate function was to act as common law courts of overlapping jurisdiction, the general law of marine insurance held in their joint custody and care could remain a general common law of the American states.

In *Swift v. Tyson*, the United States Supreme Court resolved a significant ambiguity in the *lex loci* principle by announcing that in commercial cases federal courts were not bound to follow inconsistent local state law. This decision cannot be fully or directly explained by the marine insurance cases and the concept of the general common law on which they depended. But these cases do show that during the first decades of the nineteenth century American courts — both state and federal — were able to develop and maintain a stable and largely uniform body of rules governing an important area of commercial law. They also show that section 34 was not thought to prevent the federal courts from using general common law in cases to which it applied. *Swift* took this proposition a step further by declaring that commercial law was, by definition, general law, but the marine insurance cases show that many of the intellectual premises for that step had already been established. Finally, despite the obvious differences between marine insurance law and negotiable instru-



ments law, the courts' experience in marine insurance cases may have had an additional practical consequence. The Justices who decided *Swift* knew that a body of general commercial law shared by the state and federal courts was possible in theory. From marine insurance cases they also knew that the creation and administration of such a body of law was, at least in some circumstances, possible in practice.

## APPENDIX

## Reported Marine Insurance Cases in the State and Federal Courts\*

## New York Supreme Court

<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>
before 1800	7	1813	10	1827	2
1800	14	1814	13	1828	1
1801	17	1815	4	1829	3
1802	18	1816	2	1830	1
1803	24	1817	4	1831	1
1804	21	1818	2	1832	0
1805	20	1819	2	1833	0
1806	22	1820	2	1834	1
1807	11	1821	0	1835	1
1808	5	1822	2	1836	2
1809	2	1823	1	1837	0
1810	8	1824	2	1838	0
1811	13	1825	2	1839	2
1812	9	1826	3	1840	2

## Massachusetts Supreme Judicial Court

<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>
before 1800	1	1813	4	1827	6
1800	0	1814	4	1828	7
1801	1	1815	12	1829	3
1802	1	1816	10	1830	3
1803	0	1817	7	1831	6
1804	1	1818	1	1832	1
1805	1	1819	3	1833	3
1806	3	1820	1	1834	2
1807	9	1821	1	1835	4
1808	8	1822	1	1836	6
1809	5	1823	2	1837	3
1810	10	1824	2	1838	6
1811	4	1825	2	1839	9
1812	10	1826	0	1840	7

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\* For purposes of these tables, a case is counted in a particular year if it came before the court within that year, even if it came before the court in another year as well.

## Pennsylvania Supreme Court

<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>
before 1800	16	1813	7	1827	0
1800	3	1814	3	1828	1
1801	1	1815	3	1829	0
1802	2	1816	2	1830	0
1803	6	1817	2	1831	0
1804	1	1818	2	1832	0
1805	1	1819	3	1833	0
1806	4	1820	3	1834	0
1807	1	1821	0	1835	0
1808	2	1822	3	1836	1
1809	2	1823	1	1837	0
1810	7	1824	1	1838	2
1811	5	1825	0	1839	2
1812	5	1826	0	1840	1

## United States Supreme Court

<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>
before 1803	0	1815	0	1828	2
1803	1	1816	1	1829	0
1804	3	1817	1	1830	2
1805	1	1818	3	1831	1
1806	2	1819	0	1832	0
1807	1	1820	0	1833	0
1808	4	1821	2	1834	2
1809	3	1822	1	1835	0
1810	6	1823	1	1836	0
1811	0	1824	0	1837 <sup>†</sup>	1
1812	1	1825	1	1838	1
1813	8	1826	0	1839	2
1814	4	1827	2	1840	1

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<sup>†</sup>This case involved a mishap that occurred on inland waters.

United States Circuit Court for the Third Circuit  
(Justice Washington)

<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>
before 1800	1	1806	9	1812	5
1800	1	1807	3	1813	1
1801	2	1808	11	1814	3
1802	0	1809	4	1815	0
1803	1	1810	1	1816	0
1804	3	1811	5	1817	1
1805	3				

There are no reported cases after 1817. The poor quality of the reporting of Washington's decisions leads me to suspect that this deficiency is as likely to have been due to the failure to report the cases as to Washington's not having decided any.

United States Circuit Court for the First Circuit  
(Justice Story)

<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>	<i>Year</i>	<i>Cases</i>
before 1815	0	1823	0	1832	2
1815	2	1824	1	1833	1
1816	1	1825	1	1834	0
1817	1	1826	3	1835	1
1818	0	1827	1	1836	1
1819	0	1828	0	1837	3
1820	1	1829	0	1838	3
1821	1	1830	0	1839	1
1822	4	1831	0	1840	2

There are no reports of any of the cases decided by Justice Story's predecessor, Justice William Cushing. Story came on the bench in 1811. As these tables show, it was too late by that time for him to have significant influence on the development of marine insurance law.