

 Open access • Journal Article • DOI:10.2307/1288984

The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy — [Source link](#)

Craig Joyce

Published on: 01 Apr 1985 - Michigan Law Review (JSTOR)

Topics: Supreme court, Marshall Court, Judicial opinion, Tribunal and Copyright Clause

Related papers:

- [The Nature of Supreme Court Power](#)
- [State Court Evasion of United States Supreme Court Mandates During the Last Decade of the Warren Court](#)
- [Strategic Defiance and Compliance in the U.S. Courts of Appeals](#)
- [State Supreme Court Decision Making in Confession Cases](#)
- [The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions](#)

Share this paper:    

View more about this paper here: <https://typeset.io/papers/the-rise-of-the-supreme-court-reporter-an-institutional-25xr41xvcu>

Michigan Law Review

Volume 83 | Issue 5

1985

The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy

Craig Joyce
Vanderbilt University

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Intellectual Property Law Commons](#), [Legal History Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985).

Available at: <https://repository.law.umich.edu/mlr/vol83/iss5/3>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE RISE OF THE SUPREME COURT REPORTER: AN INSTITUTIONAL PERSPECTIVE ON MARSHALL COURT ASCENDANCY†

Craig Joyce*

*"In my judgment there is no more fair or honorable road to permanent fame"*¹

INTRODUCTION

With the death of John Marshall in 1835, the Court that bears his name passed officially into history. The sesquicentennial of the Marshall Court in 1985 offers a welcome opportunity to reexamine the achievement of that Court from a vantage point long neglected in the literature: namely, the institutional perspective. Fittingly, the most appropriate place to begin that inquiry is the Court's own decision in *Wheaton v. Peters*,² its first pronouncement on the law of intellectual property but also, and more importantly for present purposes, the last "great case" of the Marshall Era. Admittedly, the decision in *Wheaton* stands among the landmarks of the Supreme Court's early years for a variety of reasons largely unrelated to the development of the Marshall Court as an institution. The core of the case's doctrine — that copyright is a statutory grant for the benefit of the author, which can be secured only by strict compliance with statutory requirements — remains foundational to the copyright law of the United States to

† Copyright 1985 by Craig Joyce.

* Assistant Professor of Law, Vanderbilt University. B.A. 1970, Dartmouth College; M.A. (Jurisprudence) 1972, Oxford University; J.D. 1975, Stanford Law School. — Ed. In the preparation of this Article, the author has had access to the files of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States [collection hereinafter cited as *Devise History*], for which he thanks the Devise Project, Professor G. Edward White of the University of Virginia School of Law and Professor Gerald Gunther of Stanford Law School. In addition, the author acknowledges with gratitude the research assistance of Mr. Douglas I. Brandon of the Vanderbilt Law School Class of 1985.

1. Justice Joseph Story to Reporter Henry Wheaton (Jan. 8, 1817), Wheaton Papers, The Pierpont Morgan Library, New York City (upon the publication of the first volume of *Wheaton's Reports*). All of the cited correspondence and other primary materials from the Morgan Library collection are used with the permission of the Morgan Library. Due to the large number of letters cited in this Article, all correspondence, regardless of its repository, is cited in an abbreviated form.

2. 33 U.S. (8 Pet.) 591 (1834).

the present day.³ The profoundly nationalistic import of the decision — establishing the supremacy of the copyright clause of the United States Constitution⁴ over common law copyright protection under state law — is a prime example of the triumph of federal sovereignty, the organizing principle of Marshall Court jurisprudence, over competing centrifugal forces in the early Republic.⁵ The manner in which that triumph came to be — including the Court's unsuccessful attempt to broker a compromise between the parties and a bitter squabble on the bench on the day of decision — shows in high relief at what cost, but how well, Marshall had built.⁶

There is more, however, to *Wheaton v. Peters*. For the principal protagonists in the litigation were none other than the third⁷ and fourth⁸ Reporters of the Court's own decisions, and the history of the contest between them provides new insight into the progress of the Court from its status as an "almost faceless" onlooker during the nation's first decade⁹ to a position of "judicial hegemony" in the federal system by the close of Marshall's tenure.¹⁰

The transformation of the Supreme Court's role and power within the American constitutional scheme during the forty-six years from the inception of John Jay's chief justiceship to the close of John Marshall's¹¹ has long been a leading theme in the histories of that period.¹² Notably absent from such histories, however, is any apparent con-

3. See text at notes 526-28 *infra*. The present governing statute is the Copyright Act of 1976, 17 U.S.C. §§ 101-812 (1982).

4. U.S. CONST. art. I, § 8: "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

5. See generally C. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835*, at 331 (1944) (by 1811, the Court had been "Federalized, or perhaps Marshallized") (quoting K. BABCOCK, *THE RISE OF AMERICAN NATIONALITY, 1811-1819*, at 293 (1906)); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 22 (1977); Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. PA. L. REV. 1 (1981); White, *The Art of Revising History: Revisiting the Marshall Court*, 16 SUFFOLK U. L. REV. 659 (1982).

6. See text at notes 484-89, 496-514 *infra*.

7. Henry Wheaton, Reporter from 1816 to 1827. Wheaton published 12 volumes of the *Reports*.

8. Richard Peters, Jr., Reporter from 1827 to 1843. Peters was dismissed by the Court on January 25, 1843, after the publication of 16 volumes of his *Reports*. His little-known seventeenth volume, covering the Court's 1843 Term, is not a part of the *United States Reports*. C. SWISHER, *THE TANEY PERIOD 1836-64*, at 304-06 (5 Devise History, 1974, *supra* note *).

9. J. GOEBEL, JR., *ANTECEDENTS AND BEGINNINGS TO 1801*, at 662 (1 Devise History, 1971, *supra* note *).

10. R. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 79 (1960).

11. 1789 to 1835.

12. See, e.g., H. CARSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES; WITH BIOGRAPHIES OF ALL THE CHIEF AND ASSOCIATE JUSTICES* (1891); C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (rev. ed. 1937); G. HASKINS & H. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15* (2 Devise History, 1981, *supra* note *).

sciousness of the indispensable role played by the Court's early Reporters in its rise to preeminence among the lawgivers of the new nation. Commentators have largely ignored the institutional component of the Court's ascendance in favor of the doctrinal aspects of that development.

Two examples will suffice. Representative of an earlier day is H.L. Carson's *Centennial History of the Court*, published in 1891. Carson summarized the effects of Marshall's insistent nationalism in terms suggestive of inescapable destiny: "Beneath the strong and steady rays cast by his mind the mists were rising, and the bold outlines of our national system were gradually revealed."¹³ Similarly, among present-day historians, George L. Haskins, in his recent study of the separation of law from politics in Marshall Court jurisprudence, has written:

Under Marshall, the Court became the ultimate seat of federal judicial power and, more important, a fertile breeding ground for developing the idea of the supremacy of the rule of law, as distinct from elusive and unpredictable accommodations to the executive and the legislature. *Inevitably*, these developments and the ideas they nurtured permeated the lower federal courts, and helped to spread nascent ideas of a new American nationalism.¹⁴

Inevitable? No. Modern lawyers, accustomed to air courier delivery of judicial opinions announced in Washington, D.C., the preceding day, are understandably blind to the difficulties encountered by the bar, the public at large and even the lower courts, in obtaining copies of the Supreme Court's decisions in an earlier age. In truth, however, the reputation of the Court in those years, and even knowledge of its utterances, depended in large part upon dissemination of its opinions by an unofficial system of private enterprise reporting whose hallmarks were delay, omission and inaccuracy, and unmanageable expense. Obscured by such deficiencies in the reporting of Marshall Court decisions, it is little wonder that the "bold outlines of our national system" rose but slowly from the "mists" during the first decades of the nineteenth century.

To understand fully, then, the Supreme Court's ascendance to power under John Marshall, one must comprehend not only the doctrine of its decisions, but also the simultaneous occurrence of a little-noted revolution within the institution itself, namely, the development of a dynamic official reporter system that led ultimately to the controversy at the heart of *Wheaton v. Peters*. That transformation was the product not only of the Reporters' own efforts, but also of active coop-

13. H. CARSON, *supra* note 12, at 242.

14. Haskins, *supra* note 5, at 27 (emphasis added).

eration by members of the Court itself, particularly Justice Joseph Story. This Article will first explore the antecedents to, and beginnings of, the reporter system under Alexander J. Dallas and William Cranch. Next, the Article will examine the transformation of the system under the Court's first official Reporter, the scholarly Henry Wheaton. Finally, the Article will recount the struggle between Wheaton and his more practical successor, Richard Peters, Jr., that culminated in 1834 in the Court's declaration that its decisions are the property of the people of the United States, and not of the Court's Reporters.

I. ANTECEDENTS AND BEGINNINGS

In retrospect, it seems commonsensical to expect that the need for an official Reporter of the decisions of the United States Supreme Court, authorized to disseminate those decisions to the bench, bar and general populace of the new nation, should have been recognized contemporaneously with the formation of the Court. It was not. The members of the first Congress in 1789, while laying out an elaborate blueprint for the structure of the new federal judiciary,¹⁵ were silent on the subject of a Reporter, as were the Justices themselves in the first and second Terms of the Court held at New York City in 1790.¹⁶ Nor does there appear to have been any discussion of the need for a Reporter when the government moved to Philadelphia, where the Court held its third Term in February of 1791.¹⁷

The explanation for this apparent oversight, however, is reasonably plain. As a practical matter, the Court had no need of a reporter, official or otherwise, during its first three Terms, for its docket was empty.¹⁸ Not until the Court's August 1791 Term was its first case, *West v. Barnes*, called for argument (and dismissed on procedural grounds without reaching the merits).¹⁹

15. Judiciary Act of 1789, 1 Stat. 73 (1789).

16. The Justices first met on February 1, 1790, the day appointed for the Court's organization, but did not achieve a quorum until the following day. The Court then sat for six days (February 2, 3, 5, 8, 9 and 10), during which time, *inter alia*, the Justices appointed two officials (the Crier on February 2 and the Clerk on February 3), but no Reporter. The Court sat again on August 2 and 3, 1790, but adjourned without any activity other than the admission of attorneys to its bar. 1 Engrossed Minutes, Records of the Supreme Court of the United States, Record Group 267, National Archives, Washington, D.C.; 1 C. WARREN, *supra* note 12, at 46-51.

17. 2 U.S. (2 Dall.) 400 (1791).

18. 1 C. WARREN, *supra* note 12, at 50-51, 53.

19. 2 U.S. (2 Dall.) 401 (1791). The Court's only other activity during the Term was to rule on a second procedural motion in *Vanstophorst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791). There were likewise no arguments on the merits during the February 1792 Term. The Court did at least hear a motion in *Oswald v. New York*, but without deciding it. 2 U.S. (2 Dall.) 401 (1792).

It was at this juncture that the need for a Reporter of the Court's decisions became clear, if not to the Court, at least to an enterprising young member of the Philadelphia bar named Alexander James Dallas. Born in Jamaica and educated in England, Dallas had migrated to the United States in 1783 and been admitted to the practice of law in Pennsylvania in 1785 at the age of twenty-six.²⁰ Dallas' career, both in private practice and public service, was to prove long and distinguished,²¹ culminating in his appointment as Madison's Secretary of the Treasury in 1814.²²

In the years immediately prior to the arrival of the federal government in Philadelphia, however, Dallas had yet to achieve notable success in his adopted nation or chosen profession. His biographer characterizes the period from 1783 to 1790 as "seven lean years of law practi[c]e, political reporting, magazine editing, hack writing, and clerical work,"²³ and his practice as consisting of "minor cases in the city and county courts and routine office work on wills and conveyances."²⁴ Not that Dallas' efforts had been entirely in vain. On the contrary, having occupied himself industriously with editing and writing for political, literary and legal journals²⁵ in Pennsylvania's capital city, Dallas had achieved an unusual degree of visibility that would lead, in December of 1790, to his appointment as Secretary of the Commonwealth.²⁶

In addition, albeit quite inadvertently, Dallas had positioned himself perfectly to become the first Reporter of Philadelphia's newest court, the fledgling Supreme Court of the United States. Between 1788 and 1790, Dallas published at least eleven accounts of cases decided in the Pennsylvania and Delaware courts. The reception accorded these reports by the bench and bar was so favorable that Dallas determined to undertake the systematic collection and publication of

The Justices were kept occupied on circuit, however, discharging their duties under the Judiciary Act. 1 C. WARREN, *supra* note 12, at 57-61.

20. R. WALTERS, JR., *ALEXANDER JAMES DALLAS: LAWYER — POLITICIAN — FINANCIER 1759-1817*, at 7, 8-9, 15, 21 (1943) (annotated manuscript thesis in Butler Library, Columbia University, of work published in abbreviated book form by University of Pennsylvania Press).

21. Sec. of Commonwealth of Penn. 1791-94; Paymaster-General to Armed Forces 1794-96; U.S. Dist. Atty. (E.D. Penn.) 1801-14 (Jefferson appointment). H. CARSON, *supra* note 12, at 617-19.

22. *Daily Natl. Intelligencer*, Oct. 7, 1814, at 2, col. 4.

23. R. WALTERS, JR., *supra* note 20, at 30.

24. *Id.* at 22.

25. Among the journals which Dallas edited or to which he contributed extensively between 1787 and 1790 were the semiweekly *Pennsylvania Evening Herald* and two monthlies, the *Columbian Magazine* and the *American Museum*. *Id.* at 22-28.

26. The Secretary acted as personal assistant to the Governor. *Id.* at 34.

Pennsylvania court decisions in book form.²⁷ His first volume, published in June of 1790, contained accounts of Pennsylvania decisions from as early as 1754, based on notes preserved by judges and lawyers,²⁸ and was appropriately titled *Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania Before and Since the Revolution*.

Perhaps the most remarkable aspect of volume 1 of Dallas' *Reports*, other than its primacy as the first volume of the *United States Reports* notwithstanding the absence therefrom of a single decision of the new nation's highest court, is its virtual novelty as an art form in American law. But for one important volume of Connecticut cases by Ephraim Kirby,²⁹ which preceded it by barely a year, Dallas' initial volume would stand indisputably as the first comprehensive publication of American law reports, federal, state or colonial.³⁰

The American colonies had hardly been a backwater of civilization during the eighteenth century. Why then the dearth of law reports, given the long tradition of reporting in English practice?³¹ One possible explanation is the limited size of the bar during the period, which presumably rendered the publication of reports of decisions in the various colonies (and later, states) a commercially dubious venture.³² Certainly, commercial difficulties were later to prove debilitating to Dallas and his immediate successors in reporting the decisions of the Supreme Court.³³

In addition, there was little need to study the judgments of American courts so long as the colonies remained yoked to the mother coun-

27. See 1 U.S. (1 Dall.) iii-iv (1790).

28. See 1 U.S. (1 Dall.) v, 30 (1790); R. Walters, *supra* note 20, at 28-29.

29. 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 (1789) [hereinafter cited as KIRBY'S REPORTS].

30. Before Kirby's *Reports*, only certain sensational cases had been reported in newspapers or pamphlets. In 1788, for example, Dallas had published accounts of six such cases in the *Columbian Magazine*. R. WALTERS, JR., *supra* note 20, at 27. Kirby's compendium of 201 cases covering three and a half years appears, therefore, to be the first comprehensive volume of law reports published in America. The only other possible contender for the title is Francis Hopkinson's *Judgments in Admiralty in Pennsylvania*, also published sometime in 1789. See J. WALLACE, *THE REPORTERS ARRANGED AND CHARACTERIZED* 571 n.2 (4th ed. 1882). *But see* Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789*, 16 AM. J. LEGAL HIST. 297, 315 n.68 (1972) (arguing that Kirby's *Reports* must have preceded Hopkinson's *Judgments*). In comparison with the reports prepared by Kirby, however, Hopkinson's were highly specialized in subject matter and far less comprehensive. J. WALLACE, *supra*, at 571 n.2. Volume 1 of Dallas' *Reports*, covering 253 cases over a period of 36 years, appeared a year after Hopkinson and Kirby.

31. Familiarity with the English reports, particularly of common law decisions, was hardly unusual during the eighteenth century, as shown by studies of estates dating from that period. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 49 (1981).

32. *Id.* at 54.

33. See text at notes 66-68, 89, 104, & 291-93 *infra*.

try.³⁴ With independence, however, American lawyers embarked upon the daunting task of tailoring English law to American circumstances, when possible, and creating a distinctly American body of law, when necessary.³⁵ Suddenly, neither English reports nor the notebooks of decisions maintained by many lawyers for use by themselves and their friends³⁶ would suffice for the practice of law in a new nation. Although a majority of the new American states considered common law decisions announced before the break with England persuasive in their courts, there seemed a pressing need for *American* decisions as precedent.³⁷ No published reports of such cases appeared in the decade following independence, however, and American courts remained almost entirely dependent on English legal literature for their common law precedents.³⁸ The law that did develop in American courts was, in the words of Ephraim Kirby, "soon forgot, or misunderstood, or erroneously reported from memory."³⁹

Clearly, American soil had become fertile ground for the flowering of "home-grown" law reports.⁴⁰ It remained to be determined, however, who would undertake the task and how it would be financed. The contrasting approaches taken in Kirby's *Connecticut Reports* and Dallas' *Pennsylvania Reports* are instructive of the problems faced by all of the early reporters, state and federal, and shed particular light on the development of the *United States Reports* under Dallas and his three immediate successors.

From the start, Kirby had significant advantages over Dallas. As early as 1784, the Connecticut General Assembly had recognized the need "to lay the foundation of a more perfect and permanent system of common law in this state," and had accordingly required the judges of the Supreme Court of Errors and the Superior Court "to give in writing the reasons of their decisions upon points of law, and lodge them with their respective clerks, with a view, as the statute expressly de-

34. Surrency, *supra* note 31, at 54. Even so, the necessity of relying solely on English reports had not been gladly accepted by all American lawyers. As one of Ephraim Kirby's correspondents observed, such reliance "ha[d] long been" less than wholly satisfactory "where the circumstances of the people, the State of Society & the modes of transacting business [in England] are very dissimilar to ours." William Whitman to Ephraim Kirby (Dec. 7, 1787), Kirby Papers, Manuscript Department, Duke University Library, Durham, North Carolina.

35. Surrency, *supra* note 31, at 54-55; Briceland, *supra* note 30, at 303-05.

36. Surrency, *supra* note 31, at 50; Briceland, *supra* note 30, at 302.

37. Briceland, *supra* note 30, at 302 n.17, 303.

38. *Id.* at 297.

39. KIRBY'S REPORTS, *supra* note 29, at iii.

40. After the Revolution, American attorneys and judges began for the first time to search the law of other American jurisdictions for citations to adorn their arguments and opinions. Surrency, *supra* note 31, at 54. This, too, must have encouraged lawyers contemplating the publication of reports.

clares, that the cases might be *fully reported*."⁴¹ Plainly, Kirby's *Reports*, covering judgments in the named courts from May of 1785 through May of 1788, benefitted directly from the General Assembly's foresight and carried into effect its specified purpose.

Dallas was not as fortunate. Not until 1806, just as he was concluding his *Reports*,⁴² did the Pennsylvania General Assembly require judges to reduce their opinions to writing, and then only at the request of the parties or their attorneys.⁴³ Dallas, therefore, was able to give only the barest description of the earliest decisions in his first volume. For a number of the more recent cases, he had access to the opinions of his patron, Chief Justice Thomas McKean of the Pennsylvania Supreme Court, but generally to no others.⁴⁴ Even this limited assistance was unavailable in the instance of the Supreme Court of the United States, whose opinions first appeared in volume 2 of Dallas' *Reports*: while Dallas reported its decisions, the Court apparently failed, even in its most important cases, to reduce its opinions to writing.⁴⁵ Certainly, no statute or rule of court required the Justices to do so.⁴⁶

Kirby, like Dallas, undertook his task without benefit of an official appointment as Reporter.⁴⁷ The two men's conceptions of their informal responsibilities to the bench and bar, however, seem to have been substantially similar, at least as reflected in their finished products.

In preparation for his work, Kirby had collected and examined numerous volumes of English reports and abridgments, along the way discovering that his intended models shared little in the way of pur-

41. "An act establishing the wages of the judges of the superior court," 3 State Rec. May Sess. 1784 at 9, *cited in* 1 Conn. xxv (1817) (emphasis in original).

42. The fourth and last of Dallas' volumes includes the December 1806 term of the Supreme Court of Pennsylvania. (Its last reported decision of the Supreme Court of the United States, however, dates from that Court's August 1800 Term. See text at notes 57-63 *infra* regarding the problem of delays in the publication of Dallas' *Reports*.)

43. Act of Feb. 24, 1806, § 25, Pa. Laws 345. In 1845, the Assembly finally required Pennsylvania's judges to render all of their decisions in writing. Act of Apr. 11, 1845, Pa. Laws 374.

44. Alexander J. Dallas to Thomas McKean (Apr. 18, 1789), *cited in* R. WALTERS, JR., *supra* note 20, at 29 n.34; 1 U.S. (1 Dall.) v (1790).

45. 5 U.S. (1 Cranch) iv-v (1804).

46. It was not until 1834 that the Court ordered the filing with the Clerk of such opinions as were written, 33 U.S. (8 Pet.) vii (1834), and even then oral opinions were not invariably reduced to writing. Richard Peters, Jr. to John Bell (Chairman, Judiciary Committee of the U.S. House of Representatives) (Jan. 20, 1834), Peters Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as Peters Papers]. All of the cited materials from Historical Society of Pennsylvania collections are used with the permission of the society.

47. Connecticut first required the appointment of an official reporter by statute in 1821. *American Reports and Reporters*, 22 AM. JURIST & L. MAG. 108, 119 (1839). Pennsylvania did not make comparable provision for the preparation of official reports until 1845. *American Reports and Reporters No. IV*, 4 ALB. L.J. 5, 6 (1871).

pose, style or arrangement.⁴⁸ Kirby's own reports seem to assume a readership interested primarily in ready access to clear, concise statements of the main points of law settled in each decision and content with bare summaries of the pleadings and arguments of counsel.⁴⁹ Thus, in addition to providing an alphabetical index of his 201 cases by plaintiffs' names, Kirby prepared a twenty-three page legal index abstracting by subject the points of law in the collected cases and referring the reader, with respect to each point, to the precise page on which the court's own words might be found.

The models for Dallas' first volume, if any, are unknown, but in execution the volume closely resembles Kirby's *Reports*. Like his Connecticut contemporary, Dallas placed primary emphasis on identifying and making accessible to practitioners the main points of law decided in the cases. Like Kirby's *Reports*, volume 1 of Dallas' *Reports* includes a lengthy subject matter index, alerting the reader to the principal issues addressed in the reports and referring him to the pertinent decision for further details. Dallas preceded each case, as had Kirby, with a brief abstract (frequently, one sentence) distilling its significance. He also prepared, in addition to an index of cases reported, an index of cases cited in the opinions of the courts. This innovation, not found in Kirby's *Reports*, seems particularly well calculated to meet the needs of a post-Revolutionary bar hungry for precedent; and the relative brevity of the index reveals what a pioneering effort it was.

Besides the differing availability of written opinions as the basis for their reports and the similarity of purpose that they brought to them, there is one final point of comparison between Dallas and Kirby that is worthy of note: the contrasting means by which the two men financed their ventures. Neither, of course, could rely on a salary as Reporter to defray expenses, as neither held an official appointment carrying an assured stipend. In Kirby's case, however, the lack of such an appointment did not forestall legislative assistance in completing his undertaking. Initially, he had hoped to cover all costs of publication through an ambitious subscription drive, which failed in part due to uncertainties concerning the effect of the proposed federal Constitution upon state legal systems.⁵⁰ By May of 1788, Kirby had raised but

48. Among these sources, Kirby seems to have been most heavily influenced by the format and philosophy of Cowper's Reports of King's Bench decisions rendered during the 1770s. Briceland, *supra* note 30, at 312-13.

49. "In these Reports, I have endeavoured to throw the matter into as small a compass as was consistent with a right understanding of the case: — Therefore, I have not stated the pleadings or arguments of counsel further than was necessary to bring up the points relied on" KIRBY'S REPORTS, *supra* note 29, at iv.

50. Briceland, *supra* note 30, at 307-10.

half of the necessary funds. He thereupon petitioned the Connecticut General Assembly for the remainder, which it appropriated for payment upon delivery of 350 copies of the finished reports for distribution to town clerks throughout the state.⁵¹ Both the appropriation and the proviso may reasonably be seen as further steps toward the accomplishment of the purposes that underlay the General Assembly's 1784 determination to require written judicial opinions in the first place.

In Pennsylvania, meanwhile, Dallas labored without any of Kirby's advantages. True, Dallas' first volume appeared with the express imprimatur of the judges of the state's highest court, commending its author's "learning, integrity and abilities" and "approv[ing] and recommend[ing] the printing and publishing [of] his book."⁵² But practical support, in the form of an appropriation by the legislature to offset current expenses and perhaps establish a market in the state for future sales, was never forthcoming.⁵³ Whereas the assistance of the General Assembly apparently enabled Kirby to break even on his Connecticut *Reports*, Dallas' experience in Pennsylvania was one of profound frustration.⁵⁴

Thus, in many respects, Kirby proved more successful than Dallas at the untried business of law reporting in a new nation. Both Dallas' first volume and Kirby's *Reports* provided otherwise unavailable reports of the decided cases, accompanied by useful aids for the diligent practitioner. Kirby, however, had the advantage of being able to reproduce all of the opinions handed down by the subject courts during the years covered by his volume; and his reports, widely circulated through the beneficence of the General Assembly, broadened his reputation without depleting his pocketbook. Yet, apparently content to let his fame rest on his first and only volume, Kirby essayed no sequel.⁵⁵

51. 6 PUBLIC RECORDS OF THE STATE OF CONNECTICUT 461-62 (1945), cited in Briceland, *supra* note 30, at 310 n.49.

52. 1 U.S. (1 Dall.) ii (1790). Kirby likewise secured the approbation of the Judges of the Connecticut Superior Court, whose decisions formed the bulk of his *Reports*. KIRBY'S REPORTS, *supra* note 29, at v.

53. "We believe that all the reports of [Pennsylvania as of 1839] are the result of individual enterprise; no statute regulations existing in relation to the publication of the decisions of the courts." *American Reports and Reporters*, *supra* note 47, at 126 (1839); see also R. WALTERS, JR., *supra* note 20, at 146 (Dallas published "at his own financial risk").

54. See text at note 89 *infra*.

55. In 1798, Connecticut Superior Court Judge Jesse Root published a volume of reports containing cases from July, 1789 to June, 1793. Between 1806 and 1813, Thomas Day published four volumes containing cases from 1802 to 1810. In 1814, the Assembly finally provided for official state reports and appointed Day to prepare them. See Briceland, *supra* note 30, at 316; *American Reports and Reporters*, *supra* note 47, at 118-19 (1839); *American Reports and Reporters No. II*, 3 ALB. L.J. 466, 468 (1871). In the meantime, Kirby became more interested in land speculation than in law reporting, eventually becoming a land commissioner in the Mississippi

Dallas pressed on, however, perhaps spurred by the prospect of increased sales prompted by the inclusion in his second, third and fourth volumes of the decisions of the federal courts newly located in Philadelphia since the publication of volume 1.⁵⁶ But there were numerous grounds for complaint concerning the execution of Dallas' later volumes, particularly by readers interested primarily in the decisions of the Supreme Court of the United States. Those problems (which, in fairness to Dallas, were not to end with his reportership) included delay, expense, omission and inaccuracy.

With respect to promptness in the publication of his reports, Dallas' pattern proved to be extremely uneven. Volume 1 of Dallas' *Reports*, containing cases decided as late as the December 1789 term of the Philadelphia County Court of Common Pleas, appeared in June of 1790, less than six months later.⁵⁷ But between *Chisholm v. Georgia*,⁵⁸ the last decision of the Supreme Court of the United States reported in Dallas' second volume, and the publication of the volume itself in 1798, there was a gap of five years. Volume 3 of Dallas' *Reports* appeared in late 1799, less than a year following the February 1799 Term with which it concluded.⁵⁹ Volume 4, however, contained no United States Supreme Court cases decided after the Court's August 1800 Term (the last held in Philadelphia) and did not reach the public until 1807, a lapse of almost seven years.

The lion's share of the blame for these delays in Dallas' publication of federal court decisions is clearly attributable to the free enterprise character of his venture. Lacking an official appointment and salary from the federal or state governments, and lacking also the comfort of a subsidy, like Kirby's in Connecticut, to assure the viability of his reports, it would be strange if Dallas had not been heavily influenced by commercial considerations. Having commenced publication of his first volume with Pennsylvania attorneys as his primary audience, Dallas may well have thought it prudent to design succeeding volumes in such a way as to maintain that readership as a core for sales. Indeed, the bulk of volume 2 of Dallas' *Reports* was devoted to state rather

Territory. President Jefferson appointed him to a federal judgeship there shortly before Kirby's death in 1804. See Briceland, *supra* note 30, at 318-19.

56. In fact, the "federal presence" in Dallas' later volumes seems *not* to have increased their sales. Steady demand for volume 1 of Dallas' *Reports* resulted in a second printing of that volume in 1806. The three later volumes sold more slowly despite their author's efforts to promote them nationally. Alexander J. Dallas to Mathew Carey (June 22, 1803), *cited in* R. WALTERS, JR., *supra* note 20, at 147 n.6.

57. R. WALTERS, JR., *supra* note 20, at 30.

58. 2 U.S. (2 Dall.) 419 (1793).

59. Even more timely was the inclusion in Dallas' third volume of cases from the April 1799 term of the U.S. Circuit Court for the Pennsylvania District.

than federal cases;⁶⁰ and its 1798 publication date may well have been dictated by a desire to include as many decisions as possible of the Supreme Court of Pennsylvania, which volume 2 reported through that court's December 1797 term. Volume 3 of Dallas' *Reports*, published only a year after its predecessor, appears to have been necessitated by a huge backlog of United States Supreme Court decisions.⁶¹ Volume 4, however, included only those Supreme Court cases decided before the Court, but not Dallas,⁶² moved to the Federal City after its August 1800 Term. The move left Dallas with but forty-six pages of cases to report. Dallas' fourth volume, therefore, did not appear until 1807, when he had a sufficient number of cases collected from the state and federal circuit courts, up to and including the December 1806 term of the Supreme Court of Pennsylvania, to justify publication.⁶³

Whatever the cause, Dallas' tardiness was a major hindrance to those hungry for information concerning the jurisprudence of the highest federal tribunal, particularly its appellate practice. In general, newspaper accounts of decisions were of little assistance in disseminating such information,⁶⁴ and, in consequence, counsel who were unable to attend the sessions of the Supreme Court of the United States in Philadelphia found it necessary to inquire of friends at the seat of government whether the Court had decided various issues of interest to them.⁶⁵

Delay, however, was not the only obstacle to the success of Dallas' venture. Expense, too, undoubtedly played a part. Publishing costs in America were generally higher than in England, and American attorneys had grown accustomed to purchasing the less expensive imported volumes. In Connecticut, Kirby's *Reports* had been considered excessively dear at three dollars per copy.⁶⁶ Dallas' four volumes, reporting courts as disparate as the Supreme Court of the United States and the

60. Pennsylvania cases comprise 251 of the volume's 480 pages. Dallas also added a smattering of cases decided in the United States Circuit Court for the Pennsylvania District and retitled his second volume *Reports of Cases Ruled and Adjudged in the Several Courts of the United States, and of Pennsylvania, Held at the Seat of the Federal Government*.

61. Decisions of the Supreme Court of the United States occupy 466 of the 519 pages in volume 3 of Dallas' *Reports*.

62. By 1800, Dallas was a successful Philadelphia lawyer and had little incentive to follow the Court to Washington City. See R. WALTERS, JR., *supra* note 20, at 144-56 (professional advancement), 159-68 (social success).

63. In addition to the 46 pages devoted to Supreme Court decisions, volume 4 of Dallas' *Reports* contains 318 pages of Pennsylvania cases and 111 pages of decisions by the United States Circuit Court for the Pennsylvania District.

64. J. GOEBEL, JR., *supra* note 9, at 665 n.9. See text at notes 114-17 *infra* (press accounts of *Marbury v. Madison*).

65. J. GOEBEL, JR., *supra* note 9, at 665-66 n.10 (citing inquiry by Alexander Hamilton).

66. Briceland, *supra* note 30, at 308.

Mayor's Court of Philadelphia,⁶⁷ appear to have encountered resistance at least as stiff from potential purchasers.⁶⁸

Yet delay and excessive expense may not have been the most grave deficiencies of Dallas' *Reports*, at least from a present-day perspective. To these must be added the twin charges that Dallas reported the first decade of the Court's existence both incompletely and inaccurately.

Completeness, or lack thereof, is a matter difficult to decide with certainty. Charles Warren's classic history of the Court claimed that Dallas had omitted at least ten percent of the cases decided during the sixteen active Terms that he reported,⁶⁹ including one "of much interest" to a later Court.⁷⁰ Chief Justice Hughes, concurring with one of Dallas' successors, thought that Dallas "probably published all the opinions that were filed."⁷¹ Writing more recently, Julius Goebel, Jr., concluded in 1971 that "somewhat less than half of the dispositions made by the Supreme Court in the first decade of its existence are reported,"⁷² although the figure "probably exceeds 70 percent" once the inquiry is limited to cases adjudicated on the merits or on jurisdictional grounds.⁷³ The dispute, in short, concerns not *whether* but *to what extent* Dallas' three volumes of *Supreme Court Reports* are incomplete.⁷⁴

67. *Commonwealth v. Schaffer*, 4 U.S. (4 Dall.) xxvi (1797).

68. See text at note 89 *infra*. The cost of Dallas' *Reports* seems, if anything, to have exceeded the price of Kirby's. Dallas sold his first volume by advance subscription in 1788 for one guinea a copy, R. WALTERS, JR., *supra* note 20, at 29, which was then roughly equivalent to five dollars. Letter from John J. McCusker (Professor of American Economic History), on file at the *Michigan Law Review*, Ann Arbor, Mich. In 1828, the total expense of purchasing volumes 2-4 of Dallas' *Reports*, volumes 1-9 of Cranch's *Reports*, and volumes 1-12 of Wheaton's *Reports* (24 volumes) was \$130 — more than \$5 each. Peters, *Proposals For publishing, by subscription, The Cases Decided in the Supreme Court of the United States, From its organization to the close of January term, 1827* (1828), Record at 9-11, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), 4 THE RECORDS AND BRIEFS OF THE SUPREME COURT OF THE UNITED STATES 1523 (microfilm: Scholarly Resources, Inc., Wilmington, Del.) [trial record hereinafter cited as Record]. One of the leading legal periodicals of the day, *American Jurist and Law Magazine*, found the combined cost of the cited volumes such a "heavy expense" that it was unable to purchase a complete set of *United States Reports* for its own library. 4 AM. JURIST & L. MAG. 417, 418 (1830) (untitled review of volumes 1 and 2 of Peters' *Condensed Reports*).

69. Between 1790 and 1800, Dallas reported "about sixty cases." There were, however, "various other cases decided but not reported," among which are the eight that Warren cites. 1 C. WARREN, *supra* note 12, at 158 n.2.

70. *United States v. Todd*, decided February 17, 1794. The decision was first mentioned in an endnote by Chief Justice Taney to *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1852), as bearing on "the nature and extent of judicial power."

71. C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 65 (1928) (following J.C. Bancroft Davis' views stated in 131 U.S. app. xvi (1888)). Neither Davis nor Hughes explained the meaning of the term "filed" in the period before the Court's order of March 14, 1834, 33 U.S. (8 Pet.) vii (1834) (requiring all opinions to be filed with the Clerk).

72. J. GOEBEL, JR., *supra* note 9, at 799.

73. *Id.* at 799 n.22.

74. The matter may ultimately be resolved with the publication of the multivolume *Docu-*

As to accuracy, the verdict on Dallas' *Reports* is less certain. When, as Goebel notes, an opinion of the Court or of one of the Justices, "as reported by Dallas, is no model of clarity,"⁷⁵ who is to be blamed: the Justices or the Reporter? If Dallas, and not the Justices themselves, must be held responsible for garbling the opinions that he transmitted to lower court judges and practitioners, the fault would be great indeed in an age when newspaper reports, the primary alternative means of communicating the developing jurisprudence of the Court, "usually [imparted] only the bare outlines of the case and the result."⁷⁶

Any careful attempt to ascertain the accuracy of Dallas' accounts of the Justices' opinions, however, raises an even more arresting question: are the opinions in fact the handiwork of the Justices — or of Dallas himself? Not a single formal manuscript opinion is known to have survived from the Court's first decade;⁷⁷ and few, if any, may ever have existed for Dallas to draw upon.⁷⁸ Nor may it be confidently assumed that in all instances Dallas was present in court to take down what the Justices said, or that he was able afterwards to consult any notes they may have kept of the opinions they announced. In one instance, Dallas wrote to Justice Cushing for assistance with a series of cases, only to find that Cushing had not retained his notes in certain of the cases, or had not delivered his opinion from notes in other cases, or had not delivered an opinion at all.⁷⁹

Instead, it seems entirely possible that many of Dallas' reports of individual cases were constructed primarily from the notes of other counsel who had attended the proceedings. For example, *Ware v. Hyl-*

mentary History of the Supreme Court of the United States, 1789-1800 [hereinafter cited as Documentary History Project], currently in preparation under the joint sponsorship of the Court and the Supreme Court Historical Society. Maeva Marcus, Coeditor of the Project, has said that, when the *Documentary History* is completed, "lawyers will be able to find and cite cases that the profession had not known existed." Marcus, *Documentary History of the Supr[e]me Court of the United States, 1789-1800*, in LEGAL INFORMATION FOR THE 1980'S: MEETING THE NEEDS OF THE LEGAL PROFESSION 421 (B. Taylor ed. 1982). Dallas failed to print a total of 110-20 opinions. Telephone conversation with Maeva Marcus (Nov. 17, 1984).

75. J. GOEBEL, JR., *supra* note 9, at 718.

76. Marcus, *supra* note 74, at 424.

77. Telephone conversation with Maeva Marcus, Coeditor, Documentary History Project (Nov. 17, 1984). "It seems odd that if opinions were written not a single one in the hand of a justice survives. So it is likely that few, if any, ever existed." Marcus, *supra* note 74, at 424. One draft opinion, by Justice Iredell for *Chisolm v. Georgia*, which appears to be the substance of the opinion printed at 2 U.S. (2 Dall.) 419, 429 (1793), has been uncovered by the Documentary History Project (*see* note 74 *supra*) in the Charles E. Johnson Collection at the North Carolina State Archives at Raleigh, N.C.

78. *See* text at notes 45-46 *supra*.

79. J. GOEBEL, JR., *supra* note 9, at 720 n.240.

ton⁸⁰ contains an acknowledgment that, having been absent during argument of the case, Dallas had resorted to the notes "of Mr. W. Tilghman, to whose kindness . . . I have been frequently indebted for similar communications, in the course of the compilation of these Reports."⁸¹ A comparison of the arguments as reported by Dallas with the recently rediscovered original of Tilghman's notes, however, reveals that Dallas did more than merely retranscribe his source. Among other liberties taken with Tilghman's notes, Dallas omitted whole paragraphs, while embroidering on, strengthening and shifting emphases in what he retained.⁸² The arguments in *Ware v. Hylton*, then, appear to be a combination of counsel's remarks and Dallas' improvements upon those remarks.

Whether the same may be said of the actual opinions in *Ware* is problematical. Having been otherwise occupied during the argument of the case, did Dallas nonetheless find time to attend the rendering of opinions? His report does not say. Justice Chase's rather detailed opinion, as recounted by Dallas, follows Tilghman's notes. Justice Cushing's does not.⁸³ Dallas attempted to obtain Cushing's notes in *Ware*, but may or may not have succeeded.⁸⁴ Does Cushing's opinion as it appears in volume 3 of Dallas' *Reports* depart from Tilghman's notes because of information that Dallas subsequently obtained from the Justice himself, or because Dallas actually heard the opinion delivered in court but recorded it differently from Tilghman, or because Dallas improved upon whatever notes he obtained, just as he had with Tilghman's notes of the arguments of counsel? On any analysis, the circumstances "cast doubt on the accuracy of the Cushing opinion as rendered by Dallas."⁸⁵

Delay, expense, omission and inaccuracy: these were among the hallmarks of Dallas' work. His *Reports*, however, had scant precedent in American law, and the task he set for himself in chronicling the rise of the nascent federal judiciary had absolutely none. The accomplishment, no doubt, fell short of the aspiration, and perhaps volumes 2, 3 and 4 of Dallas' *Reports* have found their place in the official *United States Reports* principally "for want of anything better."⁸⁶ In light of the difficulties that confronted him, however, a more

80. 3 U.S. (3 Dall.) 199 (1796).

81. 3 U.S. (3 Dall.) at 207 n.*.

82. Marcus, *supra* note 74, at 425.

83. *Id.*

84. J. GOEBEL, JR., *supra* note 9, at 720 n.240.

85. Marcus, *supra* note 74, at 425.

86. *Id.* at 421.

accurate (if still restrained) summation may be that “Mr. Dallas was a very competent person [who] eventually left things better than he found them”⁸⁷

Whatever the judgment of posterity, Dallas became “the subject of . . . much abuse” at the hands of his contemporaries.⁸⁸ When at last the federal government, including the Supreme Court, moved to Washington City in 1800, Dallas seems almost to have rejoiced to have the yoke of reporting the Court’s decisions lifted from his shoulders. Writing to his friend, Jonathan Dayton, in 1802, he lamented:

I have found such miserable encouragement for my Reports, that I have determined to call them all in, and devote them to the rats in the State-House. . . . [L]et me beg the favor of you to *direct a servant to nail up*, and forward, those that remain in your care. The manuscript of the 4t. Volume is compleat — it brings the *decisions* of the Supreme Court of the US. down to the last Term; but I will commit it to the flames *instead of the press*.⁸⁹

Indeed, the Justices themselves doubted that Dallas had sufficient relish for reporting left to publish the cases decided during the Court’s last three Terms in Philadelphia;⁹⁰ and Dallas’ successor, William Cranch, wrote to him in 1803 offering to print the opinions from those Terms in the first volume of his own *Reports*.⁹¹ Ultimately, the decisions in question, carrying the work of the Court through its August 1800 Term, appeared in volume 4 of Dallas’ *Reports* (preceded, however, by the first three volumes of the eager Cranch).

William Cranch, like Dallas before him, assumed his responsibilities as Reporter more by chance than premeditation.⁹² Born in Massachusetts in 1769 and graduated from Harvard at age nineteen, Cranch had been a classmate there of John Quincy Adams. His mother, moreover, was Abigail Adams’ sister. Having moved to the new capital city as legal agent for a real estate speculation syndicate, Cranch was

87. B. HAMMOND, *BANKS AND POLITICS IN AMERICA* 229 (1957).

88. Richard Rush to Henry Wheaton (Oct. 17, 1816), Wheaton Papers, *supra* note 1.

89. Alexander J. Dallas to Jonathan Dayton (Oct. 18, 1802), George M. Dallas Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as Dallas Papers] (emphasis in original). The author gratefully acknowledges being directed to this correspondence, and to the documents cited in notes 90, 95 & 110 *infra*, by James R. Perry, Coeditor, Documentary History Project.

90. According to Cranch, Justice Washington had advised him that Dallas possessed notes of the cases decided during those Terms but “ha[d] relinquished the idea of publishing them.” William Cranch to Alexander J. Dallas (July 25, 1803), Dallas Papers, *supra* note 89.

91. As Cranch rightly noted, “It would certainly be interesting to the profession, and important to the stability of our national jurisprudence, that the chain of cases should be complete.” *Id.*

92. The information in the following paragraph is distilled from Hagner, *William Cranch, 1769-1855*, in 3 *GREAT AMERICAN LAWYERS* 87 (W. Lewis ed. 1907), and Dunne, *Early Court Reports*, in *YEARBOOK* 1976, at 61, 63-64 (Supreme Court Historical Society, 1975).

caught up and ruined in its spectacular collapse,⁹³ only to be rescued by his well-placed uncle, President John Adams. Adams appointed the young lawyer a Commissioner of Public Buildings in the Federal City in 1800, and an assistant judge of the newly created District of Columbia Circuit Court in 1801. The Act of March 8, 1802, intended by the Jeffersonians to sweep out Adams' "midnight judges," made no mention of Cranch's court.⁹⁴ Cranch remained on the bench for an unprecedented fifty-four years, becoming chief judge upon appointment by Jefferson in 1805.

In the meantime, Cranch had begun to report the decisions of the Supreme Court. Precisely how he came to the post is not known. The older histories occasionally refer to Cranch as the first "regularly appointed" Reporter of the Court's decisions.⁹⁵ But no such entry appears in the minutes of the Court, nor had Congress or the Court provided for such an appointment by statute or rule.⁹⁶ Without doubt, the reports published by Cranch, like the volumes of his predecessor, remained at all times a private venture.⁹⁷ Thus, it seems most likely that Cranch, like Dallas, appointed himself to report the decisions of the Court, perhaps encouraged by the closeness, both physical and personal, that conditions in the Federal City fostered within its small legal community.⁹⁸

Cranch also seems to have been motivated to take on the burdens of reporting, at least in part, by a keen appreciation of the importance

93. Ironically, the debacle wound up a subject of Cranch's own reports in *Pratt v. Carroll*, 12 U.S. (8 Cranch) 471 (1814).

94. While repealing the Acts of Feb. 13 (ch. 4, 2 Stat. 89 (1801) (repealed by Act of Apr. 29, 1802, ch. 31, 2 Stat. 171)) and Mar. 3, 1801 (ch. 32, 2 Stat. 109 (1801) (repealed by Act of Mar. 8, 1802, ch. 8, 2 Stat. 132)), the Republicans left untouched the Act of Feb. 27, 1801 (ch. 15, 2 Stat. 103), which had created the U.S. Circuit Court for the District of Columbia.

95. *E.g.*, H. CARSON, *supra* note 12, at 619; Hagner, *supra* note 92, at 93. As indicated in note 16 *supra*, however, the Court's only appointed officials during the period appear to have been the Clerk and the Crier (and possibly the Marshall). Cranch had earlier tried but failed to secure an appointment as Clerk. *See* Thomas B. Adams (son of John and Abigail Adams, and Cranch's cousin) to William Cranch (July 15, 1799), William Cranch Papers, Cincinnati Historical Society, Cincinnati [collection hereinafter cited as Cranch Papers] (predicting the retirement of Samuel Bayard as Clerk and offering to assist Cranch in succeeding him); William Cranch to Thomas B. Adams (Jan. 30, 1800), Cranch Papers, *supra* (expressing Cranch's hope that "obtaining this little unenvied place" would help him replenish his finances after the land speculation fiasco); Thomas B. Adams to William Cranch (Aug. 15, 1800), Cranch Papers, *supra* (consoling Cranch when the Clerkship went instead to Elias B. Caldwell).

96. Hagner, *supra* note 92, at 93. *See* text at notes 317-43 *infra* concerning the controversy over passage of the first Reporter's Bill (finally approved by Congress as the Act of Mar. 1, 1817, ch. 63, 3 Stat. 376).

97. *See* text at notes 429-33 *infra* (protests of Cranch and Wheaton regarding impact of Peters' *Condensed Reports* upon income of Peters' predecessors).

98. *See generally* G. HASKINS & H. JOHNSON, *supra* note 12, at 74-78; *see also* text at notes 187-88 *infra* (sharing of quarters by Henry Wheaton and Justice Joseph Story in boarding house occupied by remainder of Court).

of the task.⁹⁹ Witness the preface to his first volume:

Much of that *uncertainty of the law*, which is so frequently, and perhaps so justly, the subject of complaint in this country, may be attributed to the want of American reports.

. . . .

Uniformity . . . can not be expected where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are made known to each other. Even in the same court, analogy of judgment can not be maintained if its adjudications are suffered to be forgotten. It is therefore much to be regretted that so few of the gentlemen of the bar have been willing to undertake the task of reporting.

. . . .

One of the effects, expected from the establishment of a national judiciary, was the uniformity of judicial decision; an attempt, therefore, to report the cases decided by the Supreme Court of the United States, can not need an apology

. . . .

If the fate of the present volume should not prove him totally inadequate to the task he has undertaken, it is [the Reporter's] intention to report the cases of succeeding terms.¹⁰⁰

Despite high hopes and laudable intentions, however, Cranch and his readers found Supreme Court reporting an exercise in disappointment.

Certainly, Cranch made every attempt to please the profession by improving on the standard of his predecessor's volumes. While retaining the case tables, indices and rudimentary notes introduced by Dallas, the new Reporter also pledged to (and, it appears, did) provide "faithful summar[ies] of the arguments of counsel."¹⁰¹ The result, as described by William Pinkney of Baltimore, was merely "unprofitable and expensive prolixity."¹⁰² Cranch also attempted, in appendices to his first and fourth volumes, to supplement the opinions themselves with useful additional matter. But again, the result seemed not to warrant the effort, and even these perfunctory attempts at scholarship

99. Indeed, Cranch's reporting was not confined to decisions of the Supreme Court. His *Reports of Cases Civil and Criminal in the U.S. Circuit Court for the District of Columbia* fill six volumes and contain over 2100 cases decided in his own court, more than five times the number in his nine volumes of *United States Reports*. Although financial embarrassment resulting from the failure of his District of Columbia land speculation had forced him into insolvency and may have contributed to his early enthusiasm for reporting, he later settled all claims with his creditors. His reports of circuit court cases, published in 1852, appear therefore to have sprung from a sincere desire to bequeath the profession the gift of useful precedents. Hagner, *supra* note 92, at 89, 94-95.

100. 5 U.S. (1 Cranch) iii-v (1804) (emphasis in original).

101. 5 U.S. (1 Cranch) at iv. Cf. text at notes 80-82 *supra* (concerning Dallas' reconstructions of the arguments of counsel).

102. William Pinkney to Henry Wheaton (Sept. 3, 1818), Wheaton Papers, *supra* note 1.

were not repeated in the remainder of Cranch's nine volumes.¹⁰³

The greater length of Cranch's *Reports* also worked against their success as a commercial venture by contributing to their cost. Eventually, the combined expense of a full set of Cranch's volumes approached fifty dollars.¹⁰⁴ Further adding to Cranch's woes was the rise of the Court's admiralty docket. Maritime cases, including those concerning marine insurance, had comprised nearly half of the Court's appellate workload even in Dallas' time;¹⁰⁵ as compared with that earlier period, the total number of such cases decided by the Court during Cranch's reportership almost tripled.¹⁰⁶ Unfortunately, "only a few of the most eminent admiralty lawyers in the great cities ha[d] any use for" such decisions, or, in consequence, for Cranch's accounts of them.¹⁰⁷

It remains a matter of conjecture whether those accounts attained the level of completeness and accuracy seemingly required by the lofty purposes stated in Cranch's preface to volume 1. On the matter of omissions, J.C. Bancroft Davis observed in his hundredth anniversary retrospective on reporting at the Court that "there is no means of knowing whether, during the time covered by the nine volumes of Cranch, . . . the court delivered any opinion in writing which the Reporter failed to report."¹⁰⁸ As to inaccuracies, the Holmes Devise volume devoted to the period refers only to the "vagaries of William Cranch's reporting";¹⁰⁹ but Justice Story complained on at least one occasion that several of Cranch's volumes were "particularly & pain-

103. Ninety-five of the 466 pages in volume 1 of Cranch's *Reports* were devoted to a note discussing the District of Columbia Circuit Court's decision, with Cranch's concurrence but over the dissent of James Marshall (the Chief Justice's brother), on a point of commercial law decided to the contrary by the Supreme Court in *Mandeville v. Riddle*, 5 U.S. (1 Cranch) 290 (1803), in an opinion by John Marshall. The second note in volume 1 occupied but five pages; and the 62 pages of notes to volume 4 of Cranch's *Reports* consisted exclusively of reproductions of two affidavits, three depositions, an opinion on an evidentiary motion and a circuit court opinion by Justice William Johnson.

104. Justice Smith Thompson's purchase of volumes 7, 8 and 9 of Cranch's *Reports* cost him \$16 in 1818. W. Gould to Smith Thompson (Feb. 3, 1818), Gilbert Livingston Papers, New York Public Library, New York City.

105. Thirty-five cases, or 40% of the total caseload, during the period from 1790 to 1801. J. GOEBEL, JR., *supra* note 9, at 803.

106. One hundred and twenty-five cases, or 33.1% of a docket increasingly filled with important constitutional cases, between 1801 and 1815. G. HASKINS & H. JOHNSON, *supra* note 12, at 379, 656.

107. Henry Wheaton to Jonathan Russell (Jan. 4, 1817), Wheaton Papers, *supra* note 1.

108. Davis, 131 U.S. app. xvi (1889).

109. Haskins and Johnson note that Cranch "obscure[d]" the relationship between certain of the cases that he reported. Further, he "was not unduly particular in the placement of his reports of cases in the proper year": decisions seem sometimes to have been allocated among the volumes of Cranch's *Reports* on a "space available" basis. G. HASKINS & H. JOHNSON, *supra* note 12, at 497 n.6.

fully erroneous."¹¹⁰

Clearly, however, the most serious of Cranch's deficiencies was his inability to render his reports in a timely fashion. Cranch's delays became more pronounced with practically every volume. The first volume of Cranch's *Reports*, including cases decided as early as the August 1801 Term, did not appear until June of 1804. As to the August and December 1801 Terms, Cranch could reasonably plead that he had not yet assumed responsibility for the *Reports* at that point and had required time to assemble the notes of others.¹¹¹ In 1802, the Court had not sat at all.¹¹² No such ready explanation, however, justified Cranch's subsequent delays or excused the inconvenience imposed on his readers. For example, volume 7 of Cranch's *Reports* (which included the Court's 1812 and 1813 sittings) appeared only after a five-year delay, at a time when litigation inspired by Jefferson's Embargo Acts and the War of 1812 had begun to flood the Court's docket.¹¹³

Delay of this magnitude in the reporting of the decisions of the nation's highest court necessarily diminished, in many instances almost to the vanishing point, the immediate impact that the Court's actions might otherwise have been expected to have on the bar and the public at large. For the newspapers of the period, the only other significant means of disseminating information concerning the jurisprudence of the Court, routinely reported even its most major doctrinal pronouncements in almost summary fashion.

One illustration will suffice. Certainly few, if any, of the Marshall Court's decisions, at least in today's estimation, exceed *Marbury v.*

110. Joseph Story to Richard Peters, Jr. (Dec. 10, 1829), Peters Papers, *supra* note 46. Cranch's papers also contain a complaint from Justice Duvall concerning the report of his dissent in *McIver's Lessee v. Walker*, 13 U.S. (9 Cranch) 164 (1815): "As it stands it does me injustice." Gabriel Duvall to William Cranch (Dec. 3, 1816), Cranch Papers, *supra* note 95.

Cranch did, of course, have the benefit of the Court's new practice "of reducing their opinion to writing, in all cases of difficulty or importance," and he noted explicitly that he had been "permitted to take copies of those opinions." 5 U.S. (1 Cranch) iv (1804). From the experience of his successor, however, it seems highly likely that what Cranch copied were the Justices' notes, sometimes polished and sometimes not, of opinions delivered orally, rather than the finished written opinions that the Reporter of Decisions receives today. *See, e.g.*, text at note 201 *infra* regarding Wheaton's access to the Justices' notes of their opinions.

111. In his preface, Cranch specifically acknowledged his debt "to Mr. [Elias B.] Caldwell, for his notes of the cases which were decided prior to February term, 1803, without the assistance of which he would have been unable to report them, as his own notes of those cases, not having been taken with that view, were very imperfect." 5 U.S. (1 Cranch) iv-v (1804). Caldwell and Cranch had been rivals for appointment as Clerk of the Court. *See* note 95 *supra*.

112. The new Jeffersonian Congress, having repealed the Judiciary Act of 1801, ch. 4, 2 Stat. 89, in early 1802 (Act of Apr. 29, 1802, ch. 31, 2 Stat. 156), postponed the next session of the Supreme Court for over a year, apparently out of fear that the Court would declare the repealing act unconstitutional. G. HASKINS & H. JOHNSON, *supra* note 12, at 184.

113. Of all the maritime and prize cases decided during Cranch's reportership, fully 53% (66 of 125) fell into his last three years. *Id.* at 656.

*Madison*¹¹⁴ in importance. Yet contemporary newspaper accounts of Marshall's opinion, on which the country was forced to rely pending the publication of Cranch's *Reports*, left much to be desired. Although perhaps too strong, Beveridge's comment on the notoriety of the decision in its time indicates the existence and gravity of the problem. "[T]he first of Marshall's great Constitutional opinions," he said of *Marbury*, "received scant notice at the time of its delivery. The newspapers had little to say about it. Even the bench and bar of the country, at least in sections remote from Washington, appear not to have heard of it"¹¹⁵ In fact, several newspapers reprinted the opinion in full, although the *Daily National Intelligencer*, one of the more prominent sources of information concerning the Court's activities, published only a brief resume.¹¹⁶ Significantly, the vast majority of attention in the press was devoted not to Marshall's assertion of the Court's right to hold an act of Congress unconstitutional, but to his alleged trespass on the field of presidential power; and many of the stories printed, in Warren's estimation, "contained a very erroneous account of the point decided."¹¹⁷

The unavailability of accurate and full newspaper accounts of the decisions of the Supreme Court made the prompt publication of Cranch's *Reports* essential.¹¹⁸ His chronic inability to accomplish that objective became a source of considerable dismay to leading members of the profession, including the Justices themselves. Pinkney of Baltimore complained that counsel "suffered a good deal by the tardiness of [Cranch's] publications," noting that the "promptitude" of his successor, Henry Wheaton, in issuing his own reports "greatly enhances their value to us all."¹¹⁹ Indeed, so dilatory were Cranch's efforts that Chief Justice Marshall, on receiving prepublication copies of volumes 7 and 8 of Cranch's *Reports* two years after Cranch had been supplanted by Wheaton, sent thanks to the latter, apparently on the assumption that Wheaton had undertaken to complete Cranch's *Reports* for him.¹²⁰

114. 5 U.S. (1 Cranch) 137 (1803).

115. 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 153 (1919). *But see* 1 C. WARREN, *supra* note 12, at 245 n.2.

116. 1 C. WARREN, *supra* note 12, at 245.

117. *Id.* at 245 n.2.

118. Warren goes so far as to observe that, prior to the publication of volume 1 of Cranch's *Reports*, "the opinions in the cases heard from 1801 to 1804 had been practically unknown." *Id.* at 288.

119. William Pinkney to Henry Wheaton (Sept. 3, 1818), Wheaton Papers, *supra* note 1; *see also* the complaints of Justice Story, note 181 *infra*, and of Attorney General Richard Rush, note 171 *infra*.

120. John Marshall to Henry Wheaton (Oct. 27, 1816), Wheaton Papers, *supra* note 1. Had

In short, it had become clear by 1815, if not before, that Cranch's volumes in many respects merely continued the glaring deficiencies first introduced into the reports of the Supreme Court by Dallas. Further, the nature of that tribunal's work had been dramatically altered, due in part to political developments beyond its control,¹²¹ but also to the Marshall Court's bold willingness to expand its role in the structure of national government.¹²² Finally, and perhaps most importantly, the Court had recently acquired, in the person of Joseph Story,¹²³ a new member keenly aware of the advantages of prompt, accurate reporting and deeply interested in the promotion of a national jurisprudence. William Cranch may well have found the delights of his reportership exhausted by the time the Court rose from its February 1815 sitting;¹²⁴ but, whether he had or not, the moment had clearly come for a change.

II. WHEATON'S REPORTERSHIP

The stories of Cranch's successors, Henry Wheaton and Richard Peters, Jr., are inextricably intertwined with the foresight and ambition of Joseph Story. In the course of two decades, from Wheaton's appointment in 1816 to the rendering of the bitterly contested decision in *Wheaton v. Peters* in 1834, these three men redefined the responsibilities and significance of the Reporter in the life of the Supreme Court. Wheaton and Peters were to be the instruments of change; Story, their constant supporter and sometime collaborator. The present section of this Article focuses on the pivotal reportership of Henry Wheaton, while the concluding section considers the contributions of Richard Peters and the decision that bears the two Reporters' names.

Just when Wheaton and Story first met is uncertain. Their correspondence indicates at least a nascent professional relationship as early as 1812, when Wheaton sought a letter of introduction from Story to William Pinkney of Baltimore, the uncrowned king of the American

Cranch fully appreciated the sacrifice that publishing his last three volumes would entail, he might well have decided to risk the displeasure of the profession by forgoing publication altogether. As late as 1828, he was still \$1000 out-of-pocket on volumes 7 through 9. William Cranch to Richard Peters, Jr. (July 18, 1823), Record, *supra* note 68, at 55.

121. See text at notes 113 *supra* and 140 *infra* concerning the effect of the War of 1812 on the Court's docket.

122. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

123. Appointed by President Madison in 1811. See H. CARSON, *supra* note 12, at 236.

124. "[T]he business of the courts of the District of Columbia had steadily increased . . . the duties of the Chief-Judge. These and other increasing engagements were doubtless influential in deciding [Cranch] to discontinue his connection with the reports of the Supreme Court." Hagner, *supra* note 92, at 94.

bar.¹²⁵ Story, although slow in complying, ultimately advised Wheaton that he would "be happy at all times to serve you in any way in my power."¹²⁶ Already, the two had assumed the roles of mentor and protégé — roles that were shortly to play so important a part in the advancement of both Wheaton's career and Story's ambitions for the Supreme Court and American law.

Story and Wheaton had much in common. To begin with, both were young lawyers and native New Englanders. Story had been born in Marblehead, Massachusetts in 1779 and admitted to the bar of that state in 1801.¹²⁷ Wheaton, Story's junior by six years, had been born in Providence in 1785 and admitted to the Rhode Island bar in 1805.¹²⁸ Both had the benefit of superior educations, Story at Harvard and Wheaton at Brown (then Rhode Island College).¹²⁹ In public life, both had complemented their professional endeavors with active, if somewhat irregular, participation in Republican politics.¹³⁰

Story's friendship with Wheaton, however, arose from common interests and inclinations rooted in deeper soil than mere politics, or even the practice of law. In part, Story seems to have been attracted to Wheaton by a shared fascination with legal scholarship. Story's contributions to the literature of American law, besides being literally

125. Henry Wheaton to Joseph Story (July 23, 1812), Wheaton Papers, *supra* note 1. The characterization of Pinkney is taken from G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 148 (1970).

126. Joseph Story to Henry Wheaton (Oct. 16, 1813), Wheaton Papers, *supra* note 1.

127. Joseph Story to William W. Story (his son) (Jan. 23, 1831), *reprinted in* W. STORY, *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 18 (1852) [hereinafter cited as *MISCELLANEOUS WRITINGS*].

128. Lawrence, *Introductory Remarks by the Editor*, in H. WHEATON, *ELEMENTS OF INTERNATIONAL LAW* xiv-xv (W. Lawrence 6th ed. 1855).

129. Story graduated in 1798. G. DUNNE, *supra* note 125, at 25-26; *see also* *MISCELLANEOUS WRITINGS*, *supra* note 127, at 15-18. Wheaton received his degree in 1802 and also traveled extensively in England and on the Continent, studying European law, during 1805 and 1806. Lawrence, *supra* note 128, at xv-xxii.

130. Story's lifelong deference to the principle of federal sovereignty, and particularly his judicial opinions once appointed to the Supreme Court of the United States, would seem to stamp him a Federalist *par excellence*. Yet, despite frequent deviations from the standard Jeffersonian line, including his notable ambivalence on the embargo issue, Story remained a member of the Republican party throughout his career in the Massachusetts legislature (1805-1808) and the United States House of Representatives (1808-1809). J. McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 17-39 (1971). As Story later explained to his son, "A Virginia Republican of that day, was very different from a Massachusetts Republican, and the anti-federal doctrines of the former state then had . . . very little support or influence in the latter State, notwithstanding a concurrence in political action upon general subjects." *MISCELLANEOUS WRITINGS*, *supra* note 127, at 27.

Meanwhile, in Providence, Wheaton had joined the local Tammany Society, then a Jeffersonian political organization, and in 1810 delivered a Fourth of July oration praised by Jefferson himself. Lawrence, *supra* note 128, at xxiii-xxiv; E. BAKER, *HENRY WHEATON 1785-1848*, at 16-17 (1937). Upon moving to New York City in 1812, Wheaton became editor of the *National Advocate*, a Tammany organ and Administration mouthpiece. E. BAKER, *supra*, at 19-21.

epic in proportion, span over four decades, almost the entire length of their author's professional life. Although the best known of Story's works (other than his judicial opinions) date from his incumbency in the Dane Professorship at Harvard Law School,¹³¹ at least four antedate even his appointment to the Supreme Court: an explication of the procedural mysteries of the common law entitled *A Selection of Pleadings in Civil Action* in 1805, and new editions of Chitty's *A Practical Treatise on Bills of Exchange*, Abbott's *A Treatise of the Law Relative to Merchant Ships* and Lawe's *A Practical Treatise on Pleading in Assumpsit* in 1809, 1810 and 1811 respectively.¹³²

Wheaton's scholarly fame, like Story's, rests in substantial part on works dating from the middle and later years of his career, particularly *Elements of International Law* (1836).¹³³ Also like Story, however, Wheaton displayed his literary and scholarly talents at an early date. Circumstances required it. He had moved from Providence to New York City in 1812 in search of greater professional opportunities, only to find that the bar there would not waive its requirement of a three-year novitiate prior to admission.¹³⁴ In the interim, Wheaton needed alternative employment. The solution, made possible by his home state political activities, was the editorship of New York's new Tammany paper, the *National Advocate*. The paper soon became a vehicle for semi-official expositions of Madison administration policy, including the war against England.¹³⁵ These interests, in turn, led Wheaton to prepare a series of articles on national policy concerning

131. Story assumed the Dane Professorship, the terms of which required publication of lectures given under its auspices, in 1829. There followed in rapid succession Story's COMMENTARIES ON THE LAW OF BAILMENTS (1832), COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833), COMMENTARIES ON THE CONFLICT OF LAWS (1834), COMMENTARIES ON EQUITY JURISPRUDENCE (1836), COMMENTARIES ON EQUITY PLEADINGS (1838), COMMENTARIES ON THE LAW OF AGENCY (1839), COMMENTARIES ON THE LAW OF PARTNERSHIP (1841), COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE (1843), and COMMENTARIES ON THE LAW OF PROMISSORY NOTES (1845). Story's output subsequent to his Supreme Court appointment, but apart from the Dane Professorship, included unsigned articles on legal subjects in Francis Lieber's ENCYCLOPEDIA AMERICANA, legal essays in such periodicals as NORTH AMERICAN REVIEW and AMERICAN LAW REVIEW, a statutory compilation entitled LAWS OF THE UNITED STATES (1827), and the fourth American edition of Abbott's SHIPPING (1829). Dunne, *Joseph Story*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 442-43 (L. Friedman & F. Israel eds. 1969).

132. J. MCCLELLAN, *supra* note 130, at 22-23, 26.

133. Wheaton's two-volume treatise became, in its time and for a generation thereafter, the standard work on the subject, admired by other writers and widely translated into foreign tongues. Almost as well known, although not as frequently reprinted, was Wheaton's HISTORY OF THE LAW OF NATIONS (1845). E. BAKER, *supra* note 130, at 146-50, 288-94; Scott, *Henry Wheaton, 1785-1848*, in 3 GREAT AMERICAN LAWYERS 279-85 (W. Lewis ed. 1907).

134. Lawrence, *supra* note 128, at xxiv.

135. *Id.* at xxiv, xxix; E. BAKER, *supra* note 130, at 18-19.

the war¹³⁶ and to condemn the New England sectionalism epitomized by the Hartford Convention.¹³⁷

Fortunately for Wheaton, both his nationalism and his interest in admiralty law, particularly the prize law so important to the conduct of the war, coincided exactly with the predilections of Joseph Story. Story's whole life had been spent in coastal Massachusetts, and maritime cases had formed a large part of his law practice prior to his appointment to the bench.¹³⁸ From 1812 on, his circuit court had been flooded with prize law cases, which formed the basis for by far the greatest part of his early opinions.¹³⁹ Indeed, so important did such matters become during the War of 1812 that even the Supreme Court, whose national jurisdiction extended well beyond Story's seafaring First Circuit, found admiralty cases amounting to at least a third of its docket.¹⁴⁰

Story's fascination with admiralty law, however, arose only in part from his personal experiences and the extraordinary number of war-time cases. The subject matter was also a scholar's delight. Historically, admiralty jurisdiction had evolved into two separate bodies of law. Under the first heading, administered by the "prize" courts, fell all maritime matters touching the conduct of war, particularly the capture of enemy vessels.¹⁴¹ Complementing these powers, at least in medieval England, had been the jurisdiction of the admiralty tribunals, sitting as what were classically denominated "instance" courts, over a broad range of peacetime affairs, including maritime commercial contracts.¹⁴²

136. For example, the *National Advocate*, July 30, 1813, at 2, col. 1, contained an editorial by Wheaton on the subject of impressed seamen and the right of search. See E. BAKER, *supra* note 130, at 20.

137. Lawrence, *supra* note 128, at xxviii. Story anticipated the separationist tendencies of the New England states a full two years before the Hartford Convention met. Writing to a friend in the summer of 1812, he lamented: "I am thoroughly convinced that the leading Federalists meditate a severance of the Union, and that if the public opinion can be brought to support them, they will hazard a public avowal of it. . . . Gracious God!" Joseph Story to Nathaniel Williams (Aug. 24, 1812), reprinted in 1 W. STORY, *LIFE AND LETTERS OF JOSEPH STORY* 229 (1851) [hereinafter cited as *LIFE AND LETTERS*].

138. See *Appleton v. Crowninshield*, 8 Mass. 340 (1811); *Whittridge v. Norris*, 6 Mass. 125 (1809); *Cook v. Essex Fire & Marine Ins. Co.*, 6 Mass. 122 (1809); *Pearce v. Phillips*, 4 Mass. 672 (1808); *Cotel v. Hilliard*, 4 Mass. 664 (1808); *Appleton v. Crowninshield*, 3 Mass. 443 (1807); *Wellman v. Nutting*, 3 Mass. 434 (1807); *Stocker v. Harris*, 3 Mass. 409 (1807); *Cleveland v. Fettyplace*, 3 Mass. 392 (1807).

139. 1 *LIFE AND LETTERS*, *supra* note 137, at 223, 227.

140. G. HASKINS & H. JOHNSON, *supra* note 12, at 407.

141. BLACK'S LAW DICTIONARY 1080 (rev. 5th ed. 1979).

142. *Id.* at 718. For a fuller description of the history of admiralty jurisdiction, see Story's opinion in *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776), described by Justice Frankfurter as the "classic" American decision on the subject. *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*, 339 U.S. 684, 691 (1950).

Under the law of the United States in the early nineteenth century, however, much of what appears clear under the foregoing description remained to be settled and approved. *Glass v. The Sloop Betsey*,¹⁴³ decided by the Supreme Court in 1794, had confirmed the constitutional grant of national judicial power over all prize cases,¹⁴⁴ making them by law the exclusive province of the federal courts.¹⁴⁵ What remained for Story and his contemporaries to accomplish on the prize side of the admiralty jurisdiction was to consolidate this new body of federal law by equipping it with adequate precedent and procedure. On the instance side, even the most fundamental questions still required resolution under American law. In England, a series of historical accidents had shriveled the admiralty court's peacetime jurisdiction to such vestigial matters as collisions, salvage, seamen's wages and bottomry bonds; whereas, on the Continent, admiralty courts in Story's time retained expansive jurisdiction over all cases connected with the sea.¹⁴⁶ Which model should the United States choose, particularly in view of the fact that adoption of the Continental system would deliver perhaps half the commercial litigation of the country to the exclusive jurisdiction of the federal courts?¹⁴⁷

The appeal to Story of developing this body of complex and arcane law, with its potential for enormous enhancement of the national power, can hardly be overstated. In the words of one review: "if a bucket of water were brought into [Story's] court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it."¹⁴⁸

In his efforts to add breadth and detail to the admiralty jurisdiction of the federal courts, Story soon found in Henry Wheaton a ready and able protégé. Wheaton's *National Advocate* had been the first paper in

143. 3 U.S. (3 Dall.) 6 (1794).

144. U.S. CONST. art. III, § 2, cl. 1: "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."

145. During and after the Revolution, the evident need for these matters to be dealt with on a national rather than a state-by-state basis had led to the creation first of a committee on prizes and captures under the Continental Congress, and then in 1780 of a Federal Court of Appeals in Cases of Capture. But the work of these first attempts at coordinating the nation's wartime naval and diplomatic efforts had been shadowed by the resistance of the new states. See H. BOURGUIGNON, *THE FIRST FEDERAL COURT: THE FEDERAL APPELLATE PRIZE COURT OF THE AMERICAN REVOLUTION, 1775-1787* (1977); J. GOEBEL, JR., *supra* note 9, at 147-95; G. HASKINS & H. JOHNSON, *supra* note 12, at 438, 453.

146. G. DUNNE, *supra* note 125, at 100.

147. *Id.* at 101.

148. Note, *Extension of Federal Jurisdiction Over State Canals*, 37 AM. L. REV. 911, 916 (1903).

the country¹⁴⁹ to publish Story's May term 1813 circuit court opinion in *The Julia*, outlawing the common practice among New England shippers of purchasing safe-conduct passes through British Royal Navy patrols.¹⁵⁰ Also, by early 1813, if not before, Wheaton had begun arguing prize cases before Story on circuit in Rhode Island.¹⁵¹

Wheaton seems to have made a strongly favorable impression, which Story expressed in an immediate and concrete fashion. By the summer of 1813, Wheaton could write to his father-in-law: "I have commenced an undertaking, to which I have been stimulated by Judge Story, who has flattered me that I might gain both money and reputation by it. It is to write a digest of the law of prizes." The undertaking would cost him "a great deal of labour," he reported, but "[t]here is not in our language any such work of considerable merit of the elementary kind, and it is very much wanted."¹⁵² By early October, Wheaton reported to Story that he had settled on his approach to the subject and prepared a general outline of the intended work.¹⁵³ Story responded warmly, concurring in Wheaton's plan and pledging to serve the younger man's ambitions at any time and in any way.¹⁵⁴

Wheaton's *Digest of the Law of Maritime Captures and Prizes* appeared in July of 1815.¹⁵⁵ Its title proved too modest. The work not only summarized, but also gave a full analysis of, the prize decisions of the tribunals of various countries, especially the United States and England, and included a general exposition of the law of nations.¹⁵⁶ The praise was immediate. Richard Rush, Attorney General of the

149. Lawrence, *supra* note 128, at xxix; Joseph Story to Nathaniel Williams (Aug. 3, 1813), reprinted in 1 LIFE AND LETTERS, *supra* note 137, at 246.

150. 14 F. Cas. 27 (C.C.D. Mass. 1813) (No. 7575). The case arose from the continued presence of the British consul in Boston selling what were popularly known as "enemy licenses." The licenses protected American ships and cargoes on the high seas from becoming prize to British men-of-war (or privateers). Merely holding such a license had not heretofore been held to be an offense against the United States because, in the typical case, the voyage itself was argued to be intended for trade with neutrals. Story held that sailing on a voyage under the license of an enemy was a furtherance of its views and interests, and as such was an illegal act which, standing alone, subjected both ship and cargo to forfeiture as prize. The Supreme Court subsequently upheld the decision in an opinion written by Story himself. 12 U.S. (8 Cranch) 181 (1814).

151. Judge W.P. Van Ness to Henry Wheaton (July 1, 1813), Wheaton Papers, *supra* note 1.

152. Henry Wheaton to Levi Wheaton (his uncle and father-in-law) (July 21, 1813), Wheaton Papers, Hay Library, Brown University, Providence [collection hereinafter cited as Hay Library Papers]. All papers from the Hay Library are used with its permission.

153. Henry Wheaton to Joseph Story (Oct. 7, 1813), Wheaton Papers, *supra* note 1.

154. Joseph Story to Henry Wheaton (Oct. 16, 1813), Wheaton Papers, *supra* note 1. The opportunity to serve would not be long in coming. The same letter reveals Story's acute interest in fast, reliable law reporting. Story's circuit already possessed a reporter with whose work he seems to have been well pleased, but the same could not be said of William Cranch and his Reports. See text at notes 175-81 *infra*.

155. Scott, *supra* note 133, at 251.

156. Lawrence, *supra* note 128, at xxxi-xxxii.

United States, wrote to Wheaton that he found the work “peculiarly acceptable,”¹⁵⁷ and, in a paper delivered to the American Philosophical Society, expressed his “unequivocal opinion” in favor of the *Prize Digest*.¹⁵⁸ Story likewise sent his congratulations: “You have honorably discharged that duty, which every man owes to his profession, and I am persuaded that your labors will ultimately obtain the rewards which learning and talents cannot fail to secure.”¹⁵⁹ Obviously delighted, he proposed that Wheaton now embark upon a treatise expounding “the *jurisdiction, law & practice of the Instance Court*.”¹⁶⁰ Asking only that Story furnish him a “ground plat” of the project’s scope, Wheaton declared that he would “be decided by the encouragement you may give me.” Such a work, he thought, might go far “to restore the Admiralty to its original dominion as so ably maintained . . . in [Story’s] decisions.”¹⁶¹ While other opportunities would ultimately supplant the proposed instance law treatise in Wheaton’s publication plans, the foundations for a fruitful collaboration with an invaluable mentor had already been well laid.

Clearly, Story had found a soul mate and protégé. The coincidence of his views with Wheaton’s, not to mention Wheaton’s manifest ability as a scholar and polemicist, seemed almost providential. Examples of the younger man’s promise abounded. There was, for example, Wheaton’s lengthy article in the January 6, 1815 edition of the *Daily National Intelligencer*, later published in pamphlet form as *Considerations on the Establishment of a Uniform System of Bankruptcy Laws Throughout the United States*, advocating one of Story’s pet projects. The foreword to the article praised it as emanating “from the pen of one of the best writers in the country.”¹⁶² Commending Wheaton’s position on the bankruptcy laws and also his recent essay on the necessity of a navigation act, Story wrote to his friend: “I am truly rejoiced that there are found public spirited young men [like you], who are willing to devote their time and talents to the establishment of a great national policy on all subjects.”¹⁶³

Wheaton’s fortunes in New York, after the initial setback of his

157. Richard Rush to Henry Wheaton (Sept. 13, 1815), Wheaton Papers, *supra* note 1.

158. R. RUSH, AMERICAN JURISPRUDENCE 50 (1815) (pamphlet), Library of Congress, Washington, D.C..

159. Lawrence, *supra* note 128, at xxxii.

160. Joseph Story to Henry Wheaton (Sept. 5, 1815), Wheaton Papers, *supra* note 1 (emphasis in original) (apparently confirming Story’s earlier encouragement on the same subject).

161. Henry Wheaton to Joseph Story (Sept. 2, 1815), Wheaton Papers, *supra* note 1.

162. Daily Natl. Intelligencer, Jan. 6, 1815, at 3, col. 3.

163. Joseph Story to Henry Wheaton (Dec. 13, 1815), *quoted in* 1 LIFE AND LETTERS, *supra* note 137, at 270-71.

delayed admission to the bar, were by this time improving. In August of 1814, Secretary of War John Armstrong had informed him of his appointment as Division Judge Advocate of the Army (presumably influenced by Wheaton's staunch support of Armstrong in the *National Advocate* during the latter's travails in the War of 1812).¹⁶⁴ By April of 1815, Wheaton had added to this first advancement an appointment as Chief Justice of the Marine Court of the City of New York.¹⁶⁵ A month later, he felt secure enough professionally to resign his editorship of the *National Advocate*.¹⁶⁶ A still better opportunity awaited him, however, in Washington City.

The many trials and deficiencies of William Cranch have already been described. By 1815, what Story termed the Court's "disrelish" with Cranch's work had reached the breaking point.¹⁶⁷ Cranch had failed to place in print a single case decided by the Court since its February 1810 Term.¹⁶⁸ In the meantime, the Court had rendered a total of 131 decisions,¹⁶⁹ all of which remained unavailable, in their complete and final form, to the bench and bar.¹⁷⁰ Even Attorney General Richard Rush, who as the government's chief representative appeared before the Court more often than any other member of the bar, could not obtain access to its recent decisions. "They are all in the hands of Judge Cranch himself," he lamented to Wheaton in April of 1815, adding that Cranch "ought to be supplanted as some penalty for

164. John Armstrong to Henry Wheaton (Aug. 7, 1814), Wheaton Papers, *supra* note 1. The Senate confirmed the appointment unanimously on October 26, 1814. Lawrence, *supra* note 128, at xxx.

165. Henry Wheaton to Levi Wheaton (Apr. 9, 1815), *cited in* E. BAKER, *supra* note 130, at 25 n.36.

166. Lawrence, *supra* note 128, at xxxi.

167. Joseph Story to Henry Wheaton (Sept. 15, 1816), Wheaton Papers, *supra* note 1.

168. Volume 6 of Cranch's *Reports*, covering the 1810 Term only, had appeared in early 1812. The publication of Cranch's volume 7, making available the decisions of the February 1812 and 1813 Terms, did not occur until September of 1816. The February 1811 Term produced no decisions. William Cushing, Story's predecessor, had died on September 13, 1810. Johnson, *William Cushing*, in 1 *THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 1789-1969*, at 70 (L. Friedman & F. Israel eds. 1969). Samuel Chase, who died on June 19, 1811, "was frequently ill with gout and unable to participate in . . . deliberations" during his last years on the Court, including its 1811 sitting. Dilliard, *Samuel Chase*, in 1 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 197 (L. Friedman & F. Israel eds. 1969). Story and Gabriel Duvall, who eventually succeeded Chase, were not nominated until November 15, 1811, with confirmation following two days later. G. HASKINS & H. JOHNSON, *supra* note 12, at 391-92. Thomas Todd and William Johnson did not attend the Court in 1811. The remaining Justices — Marshall, Bushrod Washington and Brockholst Livingston — met but did not constitute a quorum. Joseph Story to Richard Peters (July 26, 1830), Peters Papers, *supra* note 46.

169. Forty-seven cases during the February 1813 Term, 46 cases during the 1814 Term, and 38 cases during the 1815 Term. G. HASKINS & H. JOHNSON, *supra* note 12, at 652.

170. *See* text at notes 114-17 *supra* (regarding the insufficiency of contemporary news accounts in publicizing the decisions of the Court).

his inexcusable delays."¹⁷¹

By whom might Cranch be "supplanted"? There is evidence, although ambiguous, that Wheaton had already volunteered himself to Rush.¹⁷² Certainly, Wheaton would have been an obvious choice, if for no other reason than that more than half of the decisions handed down in the Terms as yet unreported by Cranch had concerned the emerging law of admiralty.¹⁷³ By coincidence, Wheaton's *Prize Digest*, so highly praised by Rush, appeared in print early in the summer of 1815.¹⁷⁴

Naming a new Reporter, however, remained the prerogative of the Court itself. Fortunately for Wheaton, he had there, in the person of Justice Story, an ally even more powerful and ardent than Rush. Story not only valued Wheaton's talents and interests as a scholar; he had also a keen appreciation of the importance of court reporters in disseminating the law and enhancing the reputations of the judges who expounded it. Story's own professional apprenticeship had been hindered by the scarcity of American reports "to enable the student to apply the learning of the Common Law to his own country, or to distinguish what was in force here, from what was not."¹⁷⁵ Within two years of his admission to the bar in 1801, however, Massachusetts had become the first of the American states to provide statutorily for an official reporter to its highest court.¹⁷⁶ Story's own elevation to the bench in 1811 brought the immediate appointment of a reporter — the first ever in the First Circuit — to chronicle his judicial progress there.¹⁷⁷ Pending publication of his opinions on circuit, an anxious Story advised Wheaton, "I have now no compendious method of carrying the decisions with me" from sitting to sitting.¹⁷⁸ Nor could lower court judges readily obtain access to Story's collected wisdom.¹⁷⁹ Indeed, as Story himself foresaw clearly, posterity's estima-

171. Richard Rush to Henry Wheaton (Apr. 6, 1815), Wheaton Papers, *supra* note 1.

172. Richard Rush's letter of April 8, 1815 to Henry Wheaton, responding to Wheaton's communication to Rush two days earlier, reported the Attorney General's "great pleasure in intimating to" other members of the bar "the wishes contained in your letter of the 6th instant" and Rush's own "desire . . . that they should be gratified." Wheaton Papers, *supra* note 1. See also Richard Rush to Henry Wheaton (Apr. 6, 1815), Wheaton Papers, *supra* note 1 (advising of Rush's "unit[y] in sentiment" with Wheaton that Cranch should be replaced).

173. Twenty cases in 1813, 29 in 1814, and 17 in 1815. G. HASKINS & H. JOHNSON, *supra* note 12, at 656.

174. See text at notes 155-61 *supra*.

175. MISCELLANEOUS WRITINGS, *supra* note 127, at 19.

176. Act of Mar. 8, 1804, 4 Mass. Perpetual Laws 227 (Thomas & Andrews 1807).

177. *American Reports and Reporters*, 22 AM. JURIST & L. MAG. 111 (1839).

178. Joseph Story to Henry Wheaton (Oct. 16, 1813), Wheaton Papers, *supra* note 1.

179. Judge W.P. Van Ness to Henry Wheaton (July 1, 1813), Wheaton Papers, *supra* note 1.

tion of his "character as a Judge" would depend critically on his opinions being "fully and accurately" preserved for study and application.¹⁸⁰ How much worse that the decisions of the nation's highest court should languish, unknown to the public or the profession, in the hands of the tardy Cranch!¹⁸¹

By the opening of the Supreme Court's February 1816 Term, both Story and Rush had cause for rejoicing. Cranch had indeed been supplanted — not surprisingly — by Wheaton. The selection of the Court's third Reporter seems to have occurred, like those of his predecessors, by informal agreement among the Justices themselves.¹⁸² As an inducement to procure his appointment, Wheaton had submitted a plan proposing "regular annual publication of the decisions, with good type, and to be neatly printed."¹⁸³ The Justices, for their part, agreed to furnish to him any written opinions they might prepare, or notes they might make in connection with their oral opinions.¹⁸⁴

Wheaton immediately set about discharging his new responsibilities with characteristic industry. Faithful to the business of the Court, he found himself compelled to attend every day of the week except Sunday. Friends in Washington described him as "completely changed" by the demands of his office. His wife, Catherine, visited but infrequently. Letters from correspondents went unanswered by the dozens.¹⁸⁵

Inevitably, the demands of the reportership, and conditions in the Federal City itself, drew Wheaton closer to the tight circle of men with whom he worked most closely — the Justices of the Court. Washington at the close of the War of 1812 remained a dusty and dismal place, "a picture of sprawling aimlessness, confusion, inconvenience, and ut-

(requesting from Wheaton, who had argued the case, an outline of one of Story's early prize decisions on circuit in Rhode Island).

180. Joseph Story to Judge Joseph Hopkinson (Feb. 10, 1840), Hopkinson Papers, Historical Society of Pennsylvania, Philadelphia.

181. Joseph Story to Richard Rush (June 26, 1814), Rush Family Papers, Princeton University Library, Princeton, New Jersey [collection hereinafter cited as Rush Family Papers] (regretting "the extraordinary delay in the publication of our Reports").

182. That would soon change. See text at notes 318-43 *infra* (concerning the origin of the Court's official authority to select its own Reporter). See also text at notes 386-400 *infra* (appointment of Richard Peters as Wheaton's successor).

183. REPORT OF THE COPYRIGHT CASE OF WHEATON VS. PETERS 6 (1834), Columbia University Library, New York City, cited in E. BAKER, *supra* note 130, at 27 n.5.

184. Record, *supra* note 68, at 2 (Wheaton's bill in equity); see also Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 614-15 (1834) (Wheaton's counsel asserting that the Justices "invited [Wheaton] to attend at his own expense and report the cases; and there was at least a tacit engagement on their part to furnish him with such notes or written opinions as they might draw up").

185. Catherine Wheaton (wife of Henry Wheaton) to Eliza Lyman (Wheaton's sister) (Mar. 2, 1817), Wheaton Papers, *supra* note 1 (describing the 1817 Term).

ter discomfort.”¹⁸⁶ The Justices themselves, enduring a self-imposed reclusive existence almost wholly divorced from the politics and society of the city, all lived and took their meals together in the same boarding house on Capitol Hill.¹⁸⁷ There Wheaton joined them, quickly becoming Story’s roommate or “chum.”¹⁸⁸

Wheaton’s intimacy with Story went well beyond rooming arrangements. The younger man felt sufficiently confident of Story’s solicitude and discretion that he could “confide . . . to [the latter’s] bosom” certain “strong expressions” concerning pressure by Secretary of War Crawford to resign his post as Division Judge Advocate of the Army.¹⁸⁹ Story likewise unburdened himself to Wheaton regarding family tragedies and other distractions.¹⁹⁰ Professionally, Wheaton and Story were equally close. On occasion, they assumed a relationship strikingly like that of present-day law clerks to their Justices. Neither man, for example, found anything unusual in Wheaton’s provision of authorities for Story to review in the preparation of his opinions.¹⁹¹ Further in a spirit of collaboration, they seem to have assembled a common library for use while in Washington.¹⁹²

More unusual from today’s perspective, however, was Story’s willingness to divulge to Wheaton aspects of the Court’s deliberations on

186. 3 A. BEVERIDGE, *supra* note 115, at 4.

187. J. YOUNG, *THE WASHINGTON COMMUNITY 1800-1828*, at 76-77 (1966); *cf.* White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 6 (1984) (noting that “the justices’ correspondence suggests a more active social life” than Young describes).

188. *E.g.*, Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1 (first broaching the possibility); Joseph Story to Henry Wheaton (Dec. 23, 1816), Wheaton Papers, *supra* note 1 (responding that “[n]othing could be more pleasant to me than to chum with you this winter; & we will so arrange it at all events”); Henry Wheaton to Joseph Story (Dec. 25, 1817), Wheaton Papers, *supra* note 1 (thanking Story for suggesting that they continue the arrangement).

189. Crawford felt this military appointment inconsistent with Wheaton’s civilian office as a judge of the New York City Marine Court. Henry Wheaton to Joseph Story (Sept. 15, 1816), Wheaton Papers, *supra* note 1. The dispute led to Wheaton’s resignation from the latter office in 1819. E. BAKER, *supra* note 130, at 31.

190. *E.g.*, Joseph Story to Henry Wheaton (Dec. 21, 1817), Wheaton Papers, *supra* note 1 (serious illness of Story’s daughter).

191. *E.g.*, *Gelston v. Hoyt*, 16 U.S. (3 Wheat.) 246 (1818). “I shall always be happy to have aids from your mind & your studies,” Story wrote in thanking Wheaton for citations to support Story’s opinion, then in draft form. “My own acquaintance with the civil & French codes is very imperfect, & I have little time to devote to a more thorough examination of them. But I shall always be grateful for the instruction which I receive from you on these subjects; & they cannot fail to be in the highest degree useful to me . . .” Joseph Story to Henry Wheaton (Nov. 13, 1817), Wheaton Papers, *supra* note 1.

192. *See* Henry Wheaton to Joseph Story (Dec. 25, 1817), Wheaton Papers, *supra* note 1 (indicating which volumes Wheaton would carry with him for the 1818 Term and requesting Story to extract cases from others that “Lord knows . . . will not be found in Washington”). At a later date, Wheaton collected funds from members of the bar to establish a Supreme Court library (although nothing came of the project until Peters’ time). Richard Peters to Henry Wheaton (Apr. 30, 1827), Peters Papers, *supra* note 46.

the cases before it, in order that Wheaton might use such information in his reports to support positions that he and Story jointly maintained. *United States v. Bevans*,¹⁹³ argued by Wheaton himself as counsel for the United States,¹⁹⁴ provides a startling example of this practice. Wheaton had urged the Court that a marine accused of murder aboard a United States warship in Boston Harbor was subject, by virtue of the Constitution's admiralty and maritime clause, to the criminal jurisdiction of the federal courts. He had buttressed his position by arguing that the murderer would otherwise go untried even in the state courts because the vessel on which the act had occurred constituted federal rather than state "territory," even though within Massachusetts' waters, and was therefore exempt from its jurisdiction. Chief Justice Marshall, writing for an apparently unanimous Court, had treated the question as one of statutory construction. Marshall held, albeit in language that Story characterized as not being drawn "with his usual precision & accuracy,"¹⁹⁵ that the act of Congress on which the indictment was founded failed to assert (even assuming the constitutional power) the jurisdiction claimed for the United States by Wheaton.

Story, although not prepared to disagree with Marshall on the issue of statutory construction that had effectively disposed of the case at hand, fervently believed that the constitutional grant, when fully exercised by Congress, conferred power upon the federal courts to hear and decide admiralty and maritime cases even in the face of a state's otherwise undoubted jurisdiction over its own territory. In response to Wheaton's request that he furnish his own draft opinion vindicating that principle for use "in giving the arguments on *our* side a more pointed turn" in the *Reports*,¹⁹⁶ Story disclosed that a majority of his brethren had concurred in his views. He had withheld his own opinion, he said, only out of "delicacy" for Marshall's feelings.¹⁹⁷

193. 16 U.S. (3 Wheat.) 336 (1818).

194. See text at notes 307-16 *infra* (other instances during his reportership in which Wheaton appeared before the Supreme Court as an advocate).

195. Joseph Story to Henry Wheaton (Apr. 10, 1818), Wheaton Papers, *supra* note 1.

196. Henry Wheaton to Joseph Story (Apr. 7, 1818), Wheaton Papers, *supra* note 1 (emphasis in original).

197. Joseph Story to Henry Wheaton (Apr. 8 & 10, 1818), Wheaton Papers, *supra* note 1. Interestingly, one of the important moving forces on the Court for presenting a public facade of unity in this and other instances of the period appears to have been the normally reticent Bushrod Washington. As Story's April 8 letter also disclosed, he had, "[a]t the earnest suggestion (I will not call it by a stronger name) of Mr. Justice Washington, . . . determined not to deliver a dissenting opinion in *Olivera vs. [Union] Insurance C[ompany]* [16 U.S. (3 Wheat.) 183 (1818)]. The truth is that I never was more entirely satisfied that any decision was wrong, than that this is; but Judge W. thinks (& very correctly) that the habit of delivering dissenting opinions on *ordinary* occasions, weakens the authority of the C[our]t & is of no public benefit."

Story thereupon dispatched the original of his draft opinion "for [Wheaton's] *private* use."¹⁹⁸ Wheaton agreed to employ it surreptitiously, as Story had suggested, to "strengthen the cause of the Admiralty jurisdiction which I have very much at heart."¹⁹⁹

Wheaton's relationships with the other Justices, while not nearly as familiar as with Story,²⁰⁰ seem in most instances to have been professionally cordial. To cite but one example, in 1817 Wheaton found himself compelled to apply to Bushrod Washington for a fresh copy of an opinion for which Wheaton had apparently misplaced his own notes.²⁰¹ Washington replied warmly that he had been pleased to receive Wheaton's request, as it provided him the opportunity to remedy an error in the opinion as delivered.²⁰² In preparing the amended opinion for the press, he enjoined Wheaton "to correct with freedom all errors in language."²⁰³ To be sure, not every aspect of Wheaton's new surroundings was equally supportive.²⁰⁴ But, in general, conditions seemed highly propitious for Wheaton to justify the Court in supplanting his predecessor with a new Reporter determined to succeed in those respects in which both Dallas and Cranch had so conspicuously failed: delay, omission and inaccuracy, and expense.

In attacking the problem of chronic delay in the appearance of the *Reports*, Wheaton moved decisively and victoriously, although not without a few disheartening moments along the way. The February 1816 Term, Wheaton's first as Reporter, concluded on March 21, 1816, when the Court handed down eleven of its forty-three deci-

(Emphasis in original.) See White, *supra* note 187, at 34-47 (further discussion of the role of the unanimous result in Marshall Court jurisprudence).

198. Joseph Story to Henry Wheaton (Apr. 10, 1818), Wheaton Papers, *supra* note 1 (emphasis in original).

199. Henry Wheaton to Joseph Story (Apr. 15, 1818), Wheaton Papers, *supra* note 1. In his *Reports*, Wheaton's accounts of his own and his co-counsel's arguments in *Bevans* occupied 28 pages lush with annotations and authorities. 16 U.S. (3 Wheat.) at 348-75.

200. For discussion of Story's active collaboration with Wheaton in the preparation of notes for his *Reports*, see text at notes 251-82 *infra*.

201. See Bushrod Washington to Henry Wheaton (May 24, 1817), Wheaton Papers, *supra* note 1.

202. Washington had been led into the error, he noted, "by depending upon an abridgment for the want of the full reports of cases." Bushrod Washington to Henry Wheaton (May 24, 1817), Wheaton Papers, *supra* note 1. The occurrence provides a further and ironic illustration of the deficiencies of law reporting during the period. The defective abridgment in question had been of Washington's own circuit court opinion in *Thelusson*, which he had meant to deliver *verbatim* in the Supreme Court! 15 U.S. (2 Wheat.) at 426 n.(h).

203. Bushrod Washington to Henry Wheaton (May 24, 1817), Wheaton Papers, *supra* note 1.

204. Justice William Johnson seems always to have been Wheaton's mortal enemy, perhaps because he was Story's also. See Johnson's attack on Wheaton's reporting, and Wheaton's defense, in *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 614, 640 n.(a) (1827) (concurring opinion) (discussed in text at notes 241-45 *infra*).

sions.²⁰⁵ By early May, he had completed his work in preparing the opinions, abstracts and arguments of counsel for the press.²⁰⁶

A series of misadventures, only partly the fault of the new Reporter, then combined to delay the publication of the *Reports* for another seven months. First, Wheaton himself decided to prepare an extensive set of scholarly annotations, both in the margins of the cases and in a separate appendix, to "illustrate the decisions by analogous authorities" and "subjoin a more ample view" of the Court's developing jurisprudence (particularly in the field of prize law).²⁰⁷ Second, he allowed himself to become sidetracked by a number of activities peripheral to the actual publication of the *Reports*. One was an effort by Story, largely unsuccessful, to counteract negative reaction to *Martin v. Hunter's Lessee*, arising from newspaper reports based on Justice Johnson's concurrence, by encouraging dissemination of his own majority opinion.²⁰⁸ Wheaton, agreeing that Johnson's opinion "placed the decision of the Court on a quicksand — yours on a rock,"²⁰⁹ found himself occupied on and off for the next three months trying to oversee the placement of Story's opinion in satisfactory forums.²¹⁰ Also, Wheaton further diminished the time available to him for editing the *Reports* by an energetic, and for the moment unsuccessful, attempt to cajole Congress into voting him a formal title and salary as Reporter.²¹¹

The most serious impediment to early publication of the *Reports*, however, arose from a source utterly beyond Wheaton's control. To his great dismay, initially not one law book publisher could be found willing to print the proposed volume on terms he felt he could accept.²¹² As Peter S. Du Ponceau, Wheaton's agent in Philadelphia, succinctly advised him: "Bookselling is at present a very bad business,

205. The most important decision of the Term, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), had been handed down on the preceding day.

206. See Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1.

207. 14 U.S. (1 Wheat.) iii, iv (1816) (Wheaton's preface). See text at notes 246-88 *infra* (further discussion of the scholarly notes to Wheaton's *Reports*).

208. Joseph Story to Henry Wheaton (Apr. 11, 1816), Wheaton Papers, *supra* note 1 (complaining about coverage of Johnson's views in the *Daily National Intelligencer* and urging Wheaton to prepare a copy of Story's opinion for publication in the same journal).

209. Henry Wheaton to Joseph Story (Apr. 19, 1816), Wheaton Papers, *supra* note 1.

210. E.g., Henry Wheaton to Joseph Story (Apr. 19 & May 21, 1816), Wheaton Papers, *supra* note 1; Joseph Story to Henry Wheaton (May 25 & July 28, 1816), Wheaton Papers, *supra* note 1.

211. E.g., Henry Wheaton to John Sergeant (Apr. 20, 1816), Sergeant Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as Sergeant Papers]; Henry Wheaton to Joseph Story (May 21, 1816), Wheaton Papers, *supra* note 1. See text at notes 318-43 *infra* (further discussion of the Reporter's Bill).

212. Wheaton tried both New York, his home base, and Boston, where Story interceded unsuccessfully for him, before turning to Philadelphia. Henry Wheaton to Joseph Story (May

& Booksellers are all out of spirits, & unwilling to undertake any original work."²¹³ This turn of events ought not to have surprised Wheaton, given his knowledge of the grave difficulties that even Story himself had encountered in trying to arrange the publication of law reports.²¹⁴ But the situation did force Wheaton to become painfully practical. He instructed Du Ponceau to offer the right to print the work to Mathew Carey, a bookseller not generally engaged in the law trade, for a mere \$1500 in notes. Carey promptly and emphatically refused the offer.²¹⁵ Ultimately, Wheaton had no choice but to let Carey purchase the copyright itself, thereby depriving him of the ownership of volume 1 of his own *Reports*.²¹⁶ He received just \$1200, payable in notes due up to fifteen months after the date of purchase.²¹⁷

From June 17, when Wheaton reluctantly signed the contract,²¹⁸ until December 20, when Carey entered his copyright for the work in the United States District Court Clerk's Office in Philadelphia,²¹⁹ six months more elapsed. As summer turned to fall, an embarrassed Wheaton assured Story that the fault lay solely with the printers, who had "sadly procrastinated."²²⁰ As autumn turned to winter, he

21, 1816), Wheaton Papers, *supra* note 1; Joseph Story to Henry Wheaton (May 23, 1816), Wheaton Papers, *supra* note 1.

213. Peter Du Ponceau to Henry Wheaton (June 3, 1816), Wheaton Papers, *supra* note 1.

214. See Joseph Story to Henry Wheaton (Oct. 16, 1813), Wheaton Papers, *supra* note 1 (decrying the timidity of Boston booksellers in printing law books and entreating Wheaton to locate a publisher in New York for the first volume of Story's circuit court opinions, collected by John Gallison); Henry Wheaton to Joseph Story (Sept. 2, 1815), Wheaton Papers, *supra* note 1 (reciting Wheaton's efforts to obtain subscriptions for the same volume); Joseph Story to Henry Wheaton (Sept. 5, 1815), Wheaton Papers, *supra* note 1 (lamenting that sales might prove so poor as to discourage publication of a second volume of Story's opinions on circuit).

Perhaps nothing better underscores the limited commercial appeal of court reports during the period than Story's decision to help subsidize the publication of Gallison's first volume, in concert with District Judge John Davis and their clerk, William Shaw. Gallison, who supplied only his labor, received in return both "the copy right & an equal share of all profits." J. Gallison, manuscript diary (July 4, 1815), *cited in* G. DUNNE, *supra* note 125, at 129 n.25. This source is also cited by Professor G. Edward White of the University of Virginia School of Law in *The Reporters: Henry Wheaton, Richard Peters and Wheaton v. Peters*, an unpublished chapter in his forthcoming Holmes Devise volume on the Marshall Court between 1815 and 1835. The author gratefully acknowledges the opportunity to review a draft of Professor White's manuscript prior to the publication of this Article, which Professor White likewise reviewed in draft.

215. Peter Du Ponceau to Henry Wheaton (June 6, 1816), Wheaton Papers, *supra* note 1.

216. Wheaton never again permitted himself to be parted from his copyrights. For a summary of his later contracts with publishers conveying printing rights only, see text at notes 301-06 *infra*.

217. Contract between Henry Wheaton and Mathew Carey (June 17, 1816), Wheaton Papers, *supra* note 1.

218. *Id.*

219. 14 U.S. (1 Wheat.) ii (1816). Wheaton's correspondence, however, indicates that the work was not generally available to the public for at least another three weeks. *E.g.*, Charles J. Ingersoll to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1.

220. Henry Wheaton to Joseph Story (Sept. 5, 1816), Wheaton Papers, *supra* note 1.

pleaded with increasing discomfort that "the delay . . . ha[d] been occasioned solely by Mr. Carey's failure to furnish paper from time to time as it was wanted by the printers."²²¹

However valid his excuses, Wheaton did not escape the pointed inquiries of those painfully accustomed to the snail-like pace of his predecessors. Attorney General Rush became increasingly impatient, passing from polite entreaty to insistence that the *Reports* issue "before the next [T]erm" to morose musings that Wheaton's first volume would likely be upstaged by the appearance of Cranch's final three.²²² Justice Washington, communicating to the Court's new Reporter through his mentor, Story, noted evenly as the months wore on: "I hear nothing of Wheaton's Reports."²²³ Story himself was more direct, pointing out the importance of timely publication of Wheaton's first volume "to justify the Court in their choice of a successor to Mr. Cranch."²²⁴

Fortunately for Wheaton, the publication of the *Reports* for the 1816 Term prior to the commencement of the 1817 Term answered all doubts regarding the wisdom of the Court in appointing a new Reporter. Dallas, at his worst, had allowed the decisions of the nation's highest tribunal to go unreported for eight years.²²⁵ Cranch, at one point, had permitted a lacuna of six years.²²⁶ Now, for the first time in the history of the *Reports*,²²⁷ the bench and the bar of the Supreme Court had the luxury of preparing for the coming campaign in Washington with copies of the preceding Term's decisions already in hand. Wheaton had accomplished his task, including the preparation of an unprecedented 487 pages of abstracts, arguments and opinions and forty-six pages of notes, in less than nine months. Nor, in retrospect, would this rapidity be seen as an unusual occurrence. Indeed, never

221. Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1.

222. Richard Rush to Henry Wheaton (June 29, Oct. 17 & Nov. 2, 1816), Wheaton Papers, *supra* note 1. Rush's fears concerning Cranch's publication schedule proved to be well grounded, judging by the copyright notices in the volumes themselves. Volume 7 of Cranch's *Reports* appeared on September 11, 1816, and volume 8 on November 5, 1816, both prior to Wheaton's first volume, which appeared on December 20, 1816; volume 9 of Cranch's *Reports*, however, did not appear until February 10, 1817.

223. Joseph Story to Henry Wheaton (Dec. 14, 1816), Wheaton Papers, *supra* note 1 (quoting Washington).

224. Joseph Story to Henry Wheaton (Dec. 23, 1816), Wheaton Papers, *supra* note 1.

225. Volume 4 of Dallas' *Reports*, not published until 1807, contained cases dating back to the August 1799 Term.

226. The last decision reported in volume 6 of Cranch's *Reports* had been handed down during the February 1810 Term. Volume 7 did not appear until late 1816.

227. Dallas' third volume had reported the February 1799 Term (and nine other Terms dating back to February of 1794) before the close of the calendar year, but probably not before the Court returned for its August 1799 Term.

again would Wheaton require *so long* to place a volume in print: typically, later volumes appeared in the summer following the Term reported, and in no instance later than October.²²⁸ Clearly, Wheaton had met and mastered the problem of delay.

Timeliness alone, however, while greatly to be desired, did not itself ensure an increase in the completeness and accuracy of the *Reports*. Indeed, it might have been purchased at their expense. Or perhaps such failings in the volumes of Dallas and Cranch merely demonstrated the limitations inherent in a system dedicated to the preservation of opinions and arguments often extemporaneously delivered from only the most rudimentary notes.

In fact, whether absolute completeness in the *Reports* ought to be sought at all posed, as Wheaton clearly saw, a series of thorny problems. There was, for one thing, the notorious vanity of the Supreme Court's distinguished bar, which then included Pinkney, Rush, Samuel Dexter, William Wirt, Thomas Addis Emmett, Robert Goodloe Harper, David B. Ogden, Henry Clay and Daniel Webster, to name but a few. To what extent, if any, should their orations before the Court be reproduced in the *Reports*? In the preface to his first volume, Wheaton addressed the issue candidly: "Of the arguments of counsel nothing more has been attempted," he wrote, "than to give a faithful outline; to do justice to the learning and eloquence of the bar would not be possible, within any reasonable limits"²²⁹ Not surprisingly, the bar objected. Responding privately to Webster's public animadversions on this aspect of his reporting, Wheaton observed sardonically to Story: "I bow with submission to [his] criticism as to the inutility of attempting to incorporate into a brief microcosmic sketch of a law argument any of those brilliant displays of eloquence which we frequently hear at the bar."²³⁰ The new Reporter's practice in the matter, however, did not change.

Wheaton's pique was understandable. Reproduction in full would have ballooned his volumes to unmanageable size. What he labored to

228. Volume 2 of Wheaton's *Reports* appeared on September 1, 1817; volume 3, on August 19, 1818; volume 4, on August 26, 1819; volume 5, on July 11, 1820; volume 6, on July 16, 1821; volume 7, on July 20, 1822; volume 8, on October 10, 1823; volume 9, on September 21, 1824; volume 10, on June 21, 1825; volume 11, on July 20, 1826; and volume 12, on June 25, 1827. Record, *supra* note 68, at 27-39. While it is true that the Reporter's Bill, discussed in the text at notes 318-43 *infra*, provided Wheaton a further incentive for the early publication of his *Reports*, this does not detract from his previously demonstrated determination and capacity to accomplish the same result as a matter of professional honor.

229. 14 U.S. (1 Wheat.) iii (1816).

230. Henry Wheaton to Joseph Story (June 6, 1817), Wheaton Papers, *supra* note 1. Ostensibly, Webster had spoken not in defense of his own efforts, but to vindicate the reputation of Samuel Dexter, a popular member of the Supreme Court bar, who died following the 1816 Term.

achieve, and protested that he had achieved, was to assure that the "style and thoughts" of each advocate had been "transfused into the report of his argument,"²³¹ with all "the points and authorities . . . faithfully recorded, where the cases either admitted of, or required, it."²³² Increasingly in subsequent Terms, however, he found it politic and expedient to request assistance from counsel themselves in preparing his summaries of arguments.²³³ Most were happy to comply, even to the point of furnishing sketches drafted "as if taken down by you."²³⁴ In due course, the bar became so confident of Wheaton's talent and good will that it dismissed its former anxieties and entrusted matters willingly into his hands.²³⁵

More troublesome by far was the question of including or omitting certain decisions of the Court. Wheaton's difficulty, as his notebooks show,²³⁶ lay neither in careless preservation of the Court's opinions nor in ignorant underestimation of their utility. He simply recognized that a number of the decisions lacked any precedential value, and thus would take up precious space in his *Reports* without adding measurably to their appeal to potential purchasers. The preface to volume 1 of Wheaton's *Reports* explained matter-of-factly that "discretion" had therefore been exercised "in omitting to report cases turning on mere questions of fact, and from which no important principle, or general rule, could be extracted."²³⁷ Wheaton seems to have continued the practice in his later volumes, with almost no criticism.²³⁸

Accuracy, on the other hand, would admit of no half measures. In this aspect of his reporting, Wheaton was fanatical to the point of

231. *Id.*

232. 14 U.S. (1 Wheat.) iii (1816).

233. On occasion, he also worked from notes of arguments taken down by members of the Court! See, e.g., Robert G. Harper to Henry Wheaton (Sept. 28, 1823), Wheaton Papers, *supra* note 1 (use of Marshall's argument notes).

234. Richard Rush to Henry Wheaton (May 28, 1817), Wheaton Papers, *supra* note 1; see also Richard Rush to Henry Wheaton (July 2, 1817), Wheaton Papers, *supra* note 1 ("making it appear as your work").

235. To cite but three examples from the February 1818 Term: G.W. Campbell to Henry Wheaton (Mar. 28, 1818), Wheaton Papers, *supra* note 1 (providing summary of argument and inviting Wheaton to "correct all errors, & supply all deficiencies both in arrangement & otherwise"); Daniel Webster to Henry Wheaton (Apr. 1, 1818), Wheaton Papers, *supra* note 1 ("Cut & carve [my argument] . . . at your own pleasure"); and William Wirt to Henry Wheaton (June 3, 1818), Wheaton Papers, *supra* note 1 (regretting inability to provide sketch of argument but noting that "I am safer in your hands than in my own, on points of law").

236. The notebooks are preserved in The Pierpont Morgan Library, New York City.

237. 14 U.S. (1 Wheat.) iv (1816).

238. Story did inquire at one point why two opinions of Chief Justice Marshall had been omitted from Wheaton's second volume. Joseph Story to Henry Wheaton (Sept. 4, 1817), Wheaton Papers, *supra* note 1. Wheaton replied that the opinions in question "contain[ed] not a grain of law, and [were] uninteresting in their details." Henry Wheaton to Joseph Story (Sept. 7, 1817), Wheaton Papers, *supra* note 1. Story let the matter drop.

“correcting the proof sheets twice with [his] own hand” to prevent even the most minute error from creeping in.²³⁹ Story, who yielded to none in his devotion to detail, could find but five “errors of the *press*” — *i.e.*, typographical errors — in examining Wheaton’s first volume, and none whatsoever in its substance.²⁴⁰ In fact, the only suggestion of consequential error during Wheaton’s entire reportership appears in Justice Johnson’s concurrence in *Ramsay v. Allegre*,²⁴¹ the last opinion in the last case in Wheaton’s very last volume. Johnson’s bitter allegation of deliberate misrepresentation in Wheaton’s reporting of William Pinkney’s argument in *The General Smith*²⁴² was only one facet of a comprehensive attack ultimately directed at Wheaton’s patron, Story, whose expansive views on the federal admiralty jurisdiction the case helped to establish.²⁴³ Wheaton’s reply, in a note appended to Johnson’s opinion,²⁴⁴ reveals much about his attitude toward his responsibilities:

It is a duty which [the Reporter] owes to the Court, to the profession, and to his own reputation, to maintain the fidelity of the Reports, which are received as authentic evidence of the proceedings and adjudications of this high tribunal. If they are not to be relied on in this respect, they are worthless.²⁴⁵

239. Henry Wheaton to Joseph Story (Aug. 16, 1821), Story Papers, University of Michigan Microfilm, Ann Arbor, Michigan.

240. Joseph Story to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1 (emphasis in original).

241. 25 U.S. (12 Wheat.) 611, 614 (1827).

242. 17 U.S. (4 Wheat.) 438 (1819).

243. *See, e.g.*, G. DUNNE, *supra* note 125, at 263-65. Story’s brief opinion for the Court in *The General Smith* had begun with an unsupported dictum of considerable consequence: “No doubt is entertained by this Court, that the Admiralty rightfully possesses a general jurisdiction in cases of material men; and if this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the District Court.” 17 U.S. (4 Wheat.) at 443 (emphasis added). The only apparent justification for Story’s dictum had been Pinkney’s admission, as reported by Wheaton, of the federal courts’ “general jurisdiction . . . over suits by material men *in personam* and *in rem*, and over other maritime contracts.” 17 U.S. (4 Wheat.) at 441 (emphasis in original). Wheaton’s headnotes in *The General Smith* reported Story’s dictum, founded on Pinkney’s reported concession, as a leading principle of the case, 17 U.S. (4 Wheat.) at 441-42; and, by the argument in *Ramsay v. Allegre*, Pinkney’s admission had evolved into a full-blown precedent cited by counsel for the material men. 25 U.S. (12 Wheat.) at 614. In his *Ramsay* concurrence, an outraged Johnson asserted that Pinkney, the leading admiralty lawyer of the day, never in fact made the sweeping concession attributed to him by Wheaton, 25 U.S. (12 Wheat.) at 636-37 — plainly mindful that the purported admission did, however, parallel and reinforce the views of Wheaton’s mentor, Story, as expressed in *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776).

244. 25 U.S. (12 Wheat.) at 640-43 n.(a). “I left Judge Johnson my compliments at the end of the Reports.” Henry Wheaton to Daniel Webster (Nov. 20, 1827), *cited in* G. DUNNE, *supra* note 125, at 265 n.16.

245. 25 U.S. (12 Wheat.) at 643. In fact, Wheaton’s own manuscript notebook of decisions and arguments during the 1819 Term suggests that there may have been more substance to Johnson’s charge than perhaps Wheaton remembered, or Johnson could have known, in 1827. The notebooks contain but four pages of argument (without any citations to authority) in *The*

In truth, Wheaton's objectives in the preparation of his *Reports* went well beyond unadorned accuracy, embracing as well scholarly excellence and improvement of the law. Cranch, it had been said, "did his work without a spark of enthusiasm, some little of which ingredient is indispensable even to a law reporter."²⁴⁶ Wheaton's own "enthusiasm for jurisprudence," which he claimed to have caught from Story,²⁴⁷ quickly became for him not a mere ingredient of reporting but the source of a consuming passion for elaboration. Others might be content to cease their labors upon reproducing correctly the citations of counsel and the Court to leading precedent. Not Wheaton. To these, he added two species of scholarly notes calculated to enhance the utility (even as they greatly enlarged the bulk) of his *Reports*. First, he appended to the cases themselves minor commentaries, which he called "marginal notes," designed "to illustrate the decisions by analogous authorities."²⁴⁸ The typical marginal note elucidated a point of law referred to, but not explained, in the arguments of counsel or the opinions of the Justices. Second, Wheaton added at the conclusion of his *Reports* a series of scholarly monographs (hereinafter, "appendix notes") intended to provide a comprehensive view of entire areas of law apropos the decisions of the Term. His aim, as he explained in the preface to his first volume, was "to collect the rules and grounds dispersed throughout the body of the same laws, in order to see more profoundly into the reason of such judgments and ruled cases," with the expected result "that the uncertainty of law, which is the principal and most just challenge that is made to the laws of our nation at this time, will, by this new strength laid to the foundation, be

General Smith, together with two notations in Wheaton's hand. The first indicates his original intention not to report the argument at all. The second, entered at a later date, states in full:

Mem. Prepare a *short* argument in this case as it ought to have been argued — giving all the authorities. They will be found principally in 2 *Gallis*. [*i.e.*, the volume of Story's circuit court reports containing his decision in *DeLovio v. Boit*].

N.B. Pinkney admit the Adm. *jurisdiction* to its full extent.

H. Wheaton, *Manuscript Notebook of Decisions and Arguments During the 1819 Term of the Supreme Court of the United States*, Wheaton Papers, *supra* note 1 (emphasis in original). The import of the *nota bene* reminder, in particular, is difficult to determine. Clearly, Wheaton found it necessary to reconstruct Pinkney's argument, supplying citations, after the fact. In presenting the argument "as it ought to have been argued," Wheaton may well have been motivated by respect for Pinkney (whose posthumous biography he prepared in 1826), by a scholarly compulsion for completeness, or by misplaced zeal to assist Story in extending the federal admiralty jurisdiction. Wheaton's intention concerning Pinkney's purported admission is still less clear. At best, Wheaton did no more than to emphasize in his report of the case remarks of counsel that the Court itself had obviously found significant; at worst, he manufactured a concession so plausible that no one, including Pinkney himself, detected it for almost a decade after the event.

246. Charles J. Ingersoll to Henry Wheaton (Jan. 1, 1817), Wheaton Papers, *supra* note 1.

247. Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1.

248. 14 U.S. (1 Wheat.) iv (1816).

somewhat the more settled and corrected."²⁴⁹ It was an ambitious undertaking: in all, the appendix notes to Wheaton's twelve volumes run to 516 pages.²⁵⁰

In the preparation of his notes, Wheaton found in his friend and Washington "chum," Justice Story, an expert and eager collaborator. This was hardly surprising, given their shared interests in prize, maritime and civil law. Story considered these bodies of law to rank among "the most beautiful & scientific efforts of the human mind, & [to be] worthy of the most diligent attention of all the profession."²⁵¹ Wheaton now proposed to place his own and Story's best learning on those and other subjects dear to his mentor's heart where they could not possibly escape the profession's notice, namely, in the *Reports* of the Supreme Court of the United States. Within weeks of the conclusion of the February 1816 Term, Story and Wheaton were in constant communication concerning supplementation for the Court's decisions. "Let me know," wrote the Justice to the Reporter, "when you shall want my proposed notes for your Reports"²⁵²

The results of Wheaton and Story's combined efforts were impressive. Wheaton's first volume contained over thirty marginal notes, and forty-six pages of appendix notes (nine percent of the volume's total). Forty of the forty-six pages in the appendix treated admiralty law, twelve in a note entitled *On the Practice in Prize Causes*²⁵³ and twenty-eight in a note captioned *On the Rule of the War of 1756*.²⁵⁴ The marginal notes appear, without exception, to be Wheaton's own, although occasionally he sought and obtained from Story advice and authorities for use in preparing them.²⁵⁵ The appendix notes were clearly the products of collaboration. Story assumed responsibility for elucidating the question of prize court practice, transmitting his draft to Wheaton with encouragement to "enlarge the sketch as far as you think expedient."²⁵⁶ The grateful recipient confined his amend-

249. 14 U.S. (1 Wheat.) at v-vi (1816) (quoting Lord Bacon).

250. Volume 1 contains 46 pages of appendix notes alone (nearly nine percent of the total 534 pages); volume 2, 87 pages; volume 3, 27 pages; volume 4, 57 pages; volume 5, 156 pages; volume 6, 71 pages; volume 8, 22 pages; and volume 10, 50 pages.

251. Joseph Story to Henry Wheaton (Nov. 13, 1817), Wheaton Papers, *supra* note 1.

252. Joseph Story to Henry Wheaton (Apr. 11, 1816), Wheaton Papers, *supra* note 1.

253. 14 U.S. (1 Wheat.) 494 (1816).

254. 14 U.S. (1 Wheat.) 507 (1816). The remaining six-page note, consisting entirely of an excerpt from other law reports, elucidated the land law of Kentucky.

255. *E.g.*, Henry Wheaton to Joseph Story (Apr. 19, 1816), Wheaton Papers, *supra* note 1, and Joseph Story to Henry Wheaton (May 25, 1816), Wheaton Papers, *supra* note 1 (both concerning the right of a subject of a belligerent state, domiciled in a neutral country, to trade with the enemy).

256. Joseph Story to Henry Wheaton (July 28, 1816), Wheaton Papers, *supra* note 1.

ments to the addition of certain ordinances demonstrating the similarity of prize jurisprudence among the European states.²⁵⁷ Wheaton's own draft concerning the Rule of 1756 benefited, in turn, from Story's detailed advice and review.²⁵⁸

Story's reaction to Wheaton's final product could not have been more laudatory:

I received yesterday your obliging favour accompanied with a copy of your reports. I have read the whole volume through hastily, but *con amore*. I am extremely pleased with the execution of the work. The arguments are reported with brevity[,] force & accuracy, & the [marginal] notes have all your clear, discriminating, & pointed learning. They are truly a most valuable addition to the text, & at once illustrate & improve it. . . . In my judgment your Reports are the very best in manner of any that have ever been published in our Country, & I shall be surpris[ed], if the whole profession do not pay you this voluntary homage.²⁵⁹

On the last point, Story was to prove sadly mistaken, at least regarding the short-term reactions most important to Wheaton's pride and prosperity;²⁶⁰ but time would prove his immediate and sincere praise to have been well founded.²⁶¹

The second volume of Wheaton's *Reports*, like its predecessor, contained copious notes in its margins and appendix, although on this occasion Wheaton pushed Story so hard for assistance that he feared he might be "taxing too heavily [Story's] good nature."²⁶² In particular, Wheaton requested and received from Story extensive marginal notes explaining decisions in matters in which he felt "least at home" and believed he could most benefit from the riches of Story's mind and library.²⁶³ Story also responded to Wheaton's entreaties that the two

257. Henry Wheaton to Joseph Story (Sept. 5, 1816), Wheaton Papers, *supra* note 1.

258. Joseph Story to Henry Wheaton (Sept. 15, 1816), Wheaton Papers, *supra* note 1 (suggestions regarding scope and authorities); Joseph Story to Henry Wheaton (Oct. 18, 1816), Wheaton Papers, *supra* note 1 (marking up Wheaton's draft). The Rule of 1756, so named because it had been first applied during the Seven Years' War (1756-1763), concerned the confiscation in wartime of neutral ships and cargo intended for the enemy.

259. Joseph Story to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1 (emphasis in original).

260. See text at note 294 *infra* (dearth of favorable reviews of Wheaton's early volumes). Story was not entirely alone, however, in his private praise. See, e.g., Richard Rush to Henry Wheaton (Dec. 13, 1816), Wheaton Papers, *supra* note 1 (Wheaton's first volume "will proudly take its rank along-side of any volume of our own, or of foreign reporters").

261. See text at note 413 *infra* (virtues of Wheaton's *Reports* as viewed a generation later).

262. Henry Wheaton to Joseph Story (May 8, 1817), Wheaton Papers, *supra* note 1.

263. Henry Wheaton to Joseph Story (Apr. 17, 1817), Wheaton Papers, *supra* note 1. Three of Story's notes appeared in explanation of *Duval v. Craig*, 15 U.S. (2 Wheat.) 45, 56 n.(a), 60 n.(b), 62 n.(c) (1817), and one in connection with *Liter v. Green*, 15 U.S. (2 Wheat.) 306, 311 n.(a) (1817).

co-venturers “finish the whole prize practice this time,”²⁶⁴ in due course furnishing a seventy-nine page *Additional Note on the Principles and Practice in Prize Causes*.²⁶⁵ Wheaton himself prepared the remaining two appendix notes, which together with Story’s contribution produced a total of eighty-seven pages, all on admiralty.

For volume 3 of Wheaton’s *Reports*, Story prepared two more marginal notes,²⁶⁶ both on common law subjects, and a seventeen-page dissertation on the patent laws for the appendix.²⁶⁷ Wheaton contributed all other marginal notes, which Story pronounced “pointed, accurate, & learned,”²⁶⁸ and ten pages of selected documents on the law of blockades to complete the appendix notes.

Volume 4, reporting the February 1819 Term, featured no marginal notes by Story and but two appendix notes: Story’s *On Charitable Bequests*,²⁶⁹ totaling twenty pages, and thirty-seven pages of prize law documents inserted by Wheaton. Perhaps both Justice and Reporter were simply enervated, coming off a Term peculiarly charged with activity and excitement.²⁷⁰ Wheaton had even considered printing this volume, the longest of his *Reports* to date, in two parts. This arrangement, he saw, might afford certain commercial advantages by allowing his publisher to treat purchasers of the first part, which would contain the *Sturges* and *Dartmouth College* cases, as subscribers for the entire volume.²⁷¹ The plan might have allowed him to reprint, possibly in an appendix to the second part, Chief Justice Marshall’s essays on *McCulloch v. Maryland* from the *Philadelphia Union*. Story had urged that they be made a part of the *Reports*, and Wheaton seems to have detected no impropriety: “It must by no means be left doubtful even for an instant whether the ground assumed by the Court is to be main-

264. Henry Wheaton to Joseph Story (May 27, 1817), Wheaton Papers, *supra* note 1.

265. 15 U.S. (2 Wheat.) app. n.1 (1817). Story’s authorship of this note was not acknowledged in the *Reports*, however. See text at notes 285-88 *infra*.

266. See *Lanusse v. Barker*, 16 U.S. (3 Wheat.) 101, 148 n.(a) (1818), *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 224 n.(a) (1818). *Robinson* also contains a second marginal note, 16 U.S. (3 Wheat.) at 219, for which Story apparently was not responsible. See 1 LIFE AND LETTERS, *supra* note 137, at 283.

267. 16 U.S. (3 Wheat.) app. n.(ii) (1818).

268. Joseph Story to Henry Wheaton, (June 7, 1818), Wheaton Papers, *supra* note 1.

269. 17 U.S. (4 Wheat.), app. n.(i) (1819).

270. The decisions reported in volume 4 of Wheaton’s *Reports* included *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). “As this volume will contain so much good matter in the Opinions of the Court & the arguments of Counsel, I do not think it worth while to put [in] many Notes.” Henry Wheaton to Joseph Story (May 13, 1819), Wheaton Papers, *supra* note 1.

271. Henry Wheaton to Joseph Story (Mar. 24, 1819), Wheaton Papers, *supra* note 1.

tained at all hazards."²⁷² Ultimately, volume 4 of Wheaton's *Reports* appeared all in one part, and its author reported apologetically to Story that there would be no room for Marshall's *Union* essays.²⁷³

In his fifth volume, Wheaton returned with a vengeance to his project of creating a comprehensive body of admiralty jurisprudence. The appendix notes consisted of five entries, four of them (or 107 of the 158-page total) devoted exclusively to admiralty matters. All were from Wheaton's pen. Story contributed a lengthy marginal note on piracy;²⁷⁴ and a second marginal note, defining the admiralty jurisdiction in cases of crime, was prepared by Wheaton largely from Story's unpublished opinion in *United States v. Bevans*.²⁷⁵ The result was a volume occupied more than one-fourth by scholarly matter, causing Wheaton to moan to Story: "I hope my readers won't think I mean to make a Law Magazine of the work."²⁷⁶ Wheaton was to prove a better prophet than he knew.²⁷⁷

Volume 6, appearing in 1821, marked the end of Wheaton's obsession with admiralty law, at least in his *Reports*. Like the immediately preceding volume, it contained five appendix notes. This time, all five (a total of seventy-one pages) dealt with admiralty; but none contained original matter, consisting instead of treaties and foreign decisions that Wheaton apparently believed should be entered on the record for future reference. Notably, for the first time since Wheaton's initial volume, Story's hand was nowhere visible. Story may have felt abused by Wheaton's ceaseless importunings for further assistance.²⁷⁸ Or he may have been exhausted from his part in preparing Wheaton's 547-

272. Henry Wheaton to Joseph Story (June 14, 1819), Wheaton Papers, *supra* note 1.

273. Henry Wheaton to Joseph Story (July 25, 1819), Wheaton Papers, *supra* note 1. Marshall would surely have rejoiced at his omission from the appendix, had he known, for the *Union* essays appeared in a garbled form which Marshall himself found "nauseous to the intellectual palate." John Marshall to Bushrod Washington (May 6, 1819), Marshall Papers, Library of Congress, Washington, D.C. For the full and engrossing story of Marshall's essays on *McCulloch*, see Professor Gunther's fascinating article, *John Marshall, "A Friend of the Constitution": In Defense and Elaboration of McCulloch v. Maryland*, 21 STAN. L. REV. 449 (1969).

274. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 n.(a) (1820).

275. See text at notes 193-99 *supra*.

276. Henry Wheaton to Joseph Story (July 2, 1820), Wheaton Papers, *supra* note 1.

277. See, e.g., text accompanying note 423 *infra* (concerning the efforts of Wheaton's successor to bolster the sales of his own works by playing on the profession's distaste for Wheaton's prolixity).

278. As early as volume 3 of Wheaton's *Reports*, Story had begun to note the difficulty of complying with Wheaton's numerous requests, owing to the press of family matters and other business. See Henry Wheaton to Joseph Story (May 8, 1818), Wheaton Papers, *supra* note 1. More recently, fearing a thin fifth volume, Wheaton had pressed Story for "two or three Notes which you may hang to any of the cases," only to find in the end that he had more matter than he could print. Henry Wheaton to Joseph Story (Apr. 20 & July 2, 1820), Wheaton Papers, *supra* note 1.

page *Digest* of the Court's opinions from 1789 to 1820, which like volume 6 of the *Reports* appeared in the latter part of 1821.²⁷⁹ The *Digest of Decisions* had been three years in the making; and, while the original conception was Story's,²⁸⁰ Wheaton had quickly assumed control of the project²⁸¹ and pressed mercilessly to obtain his tired benefactor's promised contributions.²⁸² Those contributions, however, proved to be a final gift. Never again would Story assist, at least in a literary capacity, in the preparation of Wheaton's *Reports*.

Not that he would have had many occasions to do so. By 1821, Wheaton had accomplished everything he believed possible to put admiralty jurisprudence on its proper course in the federal courts,²⁸³ and his own finances and ambitions dictated redirecting his energies to other matters.²⁸⁴ As a result, while not abandoning his practice of providing useful matter, as necessary, in the margins of the cases, Wheaton included only three appendix notes in the remaining six volumes of his *Reports*: two sets of excerpts concerning common law points in volume 8 and one collection of documents on the slave trade in volume 10. Altogether, these annotations totaled just seventy-two pages.

One curious aspect of Story's joint venture with Wheaton in the preparation of notes to the *Reports* remains to be mentioned. In the course of five years, Story had contributed to Wheaton's *Reports* 131 closely printed pages of highly sophisticated annotations, or 184 pages overall when marginal notes are included.²⁸⁵ Yet, in Wheaton and

279. H. WHEATON, A DIGEST OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, FROM ITS ESTABLISHMENT IN 1789, TO FEBRUARY TERM, 1820, INCLUDING THE CASES DECIDED IN THE CONTINENTAL COURT OF APPEALS IN PRIZE CAUSES, DURING THE WAR OF THE REVOLUTION (1821). The title of the work reflects Wheaton and Story's continued devotion to building up the law of admiralty.

280. See Henry Wheaton to Joseph Story (Aug. 10, 1818), Wheaton Papers, *supra* note 1 (acknowledging Story's "proposal" for the *Digest of Decisions*, agreeing to "grapple with the task" and accepting Story's "kind offer" of assistance). Story's far-sighted love of scholarship even led him to suggest that the work include a table "of the cases which have been doubted, overruled, explained or specially commented on." Joseph Story to Henry Wheaton (Aug. 12, 1818), Wheaton Papers, *supra* note 1. No such table appeared in the *Digest of Decisions* when published.

281. Henry Wheaton to Joseph Story (Aug. 10, 1818), Wheaton Papers, *supra* note 1 (stating also Wheaton's preference that the labor of preparing the work be divided between them by "titles," *i.e.*, subject matter, rather than by volumes of the Court's *Reports* as Story had suggested).

282. *E.g.*, Henry Wheaton to Joseph Story (Oct. 10, 1820), Wheaton Papers, *supra* note 1 (hoping to receive Story's overdue titles by the end of the week, while acknowledging that "[b]eggars must not be choosers, either as to time, or anything else").

283. Of his 444 pages of appendix notes to date, 378 had been devoted to admiralty matters — almost 85%!

284. See text at notes 295-345 *infra*.

285. The latter figure is derived from 1 LIFE AND LETTERS, *supra* note 137, at 282-83. Story

Story's time, this significant and interesting circumstance appears to have been almost completely unknown. The collaborators wished it to be so. Writing confidentially in his memorandum book in 1819, Story noted simply: "It is not my desire ever to be known as the author of any of the notes in Mr. Wheaton's Reports." Indeed, he said, he had made it "an express condition, that the notes furnished by me should pass as his own, and I know full well, that there is nothing in any of them which he could not have prepared with a very little exertion of his own diligence and learning."²⁸⁶ Wheaton was properly grateful, but also embarrassed by the praise bestowed on certain of "his" annotations.²⁸⁷ Neither man, however, revealed the deception. Story's son, William, disclosed a portion of the story after the deaths of both of the principals,²⁸⁸ and the full record is preserved in their correspondence. But it remains a secret in the official *Reports* of the Court they served.

Whatever the source of the annotations to Wheaton's *Reports*,²⁸⁹ they were in many respects a considerable success, at least among the leading members of the bar who could afford to possess the volumes. William Pinkney summed up nicely the reaction of this segment of Wheaton's intended audience. Putting his finger on that aspect of the Reporter's accomplishment perhaps most appreciated by his readership, Pinkney wrote: "The promptitude, with which the Reports follow the decisions, greatly enhances their value to us all. We have heretofore suffered a good deal by the tardiness of your predecessor's publications." As to "the Manner in which these reports are given," Pinkney rejoiced that Wheaton had managed to "avoid . . . prolixity in stating the arguments of Counsel," while providing "the substance of them with perfect clearness." The appendices to the *Reports* were "well executed and cannot fail to be useful." In short, said Pinkney, "[t]he Profession [is] infinitely indebted to you"²⁹⁰

One difficulty, however, remained. If omission and inaccuracy had been Dallas' principal weakness and "inexcusable delay" Cranch's, the *Reports* of Henry Wheaton suffered most seriously from inordinate expense. In his zeal for scholarly excellence and improve-

also prepared nine titles for Wheaton's *Digest of Decisions*, discussed in notes 279-82 *supra*. *Id.* at 292-93.

286. *Id.* at 283 (quoting Story's entry of June 12, 1819).

287. "I blush to see," he confided to Story, "that Chief Justice Spencer [of New York] has very much praised Mr. Wheaton's note on guaranties to *Lanusse v. Barker* in my [3]d vol. *You* know how much of that praise *I* deserve." Henry Wheaton to Joseph Story (June 14, 1819), Wheaton Papers, *supra* note 1 (emphasis in original).

288. 1 LIFE AND LETTERS, *supra* note 137, at 283-84.

289. In fairness to Wheaton, it must be remembered that he personally had authored three-quarters of the appendix notes, and virtually all of the marginal notes.

290. William Pinkney to Henry Wheaton (Sept. 3, 1818), Wheaton Papers, *supra* note 1.

ment of the law, Wheaton had inadvertently pushed the cost of the final product well beyond the reach of that critical market, the mass of ordinary practitioners. The *Reports* of the United States Supreme Court had become a treasure trove of law and learning, but one that required a king's ransom to possess. Wheaton's volumes, more expensive than Cranch's even at the outset,²⁹¹ were by the conclusion of his service "exorbitantly dear" at \$7.50 each.²⁹² "[I]t is manifest," as Story so accurately noted in a letter to Wheaton's successor in 1828, "that the profession at large cannot afford to buy" Wheaton's volumes, however valuable.²⁹³

Not only were Wheaton's *Reports* expensive, but they also lacked reviews in the legal periodicals, at least initially.²⁹⁴ Without public

291. Justice Smith Thompson's 1818 purchase of volumes 7, 8 and 9 of Cranch's *Reports* cost him \$16, while Wheaton's second volume alone cost \$6.50. Invoice of W. Gould to Smith Thompson (Feb. 3, 1818), Gilbert Livingston Papers, New York Public Library, New York City.

292. W.F. Gray to Phillip Barbour (Nov. 29, 1826), Ambler Family Papers, University of Virginia, Charlottesville, Virginia.

293. Joseph Story to Richard Peters, Jr. (June 26, 1828), Peters Papers, *supra* note 46 (complaining of the high cost of both Wheaton's and Cranch's *Reports*); see also Robert Donaldson to Henry Wheaton (Aug. 11, 1828), Wheaton Papers, *supra* note 1 (publisher of volumes 2 through 12 of *Reports* reminding Wheaton of continuing slow sales of *Reports* and *Digest of Decisions*).

294. Wheaton considered early, favorable reviews of the *Reports* to be crucial to the success of his undertaking. They were not forthcoming. Story ascribed the absence of such reviews to "the indolence & want of professional esprit de corps among the members of the bar It is strange," he wrote following the publication of volume 2 of Wheaton's *Reports*, "that not one learned and eloquent advocate has as yet volunteered to commend your works to the public as they deserve." Joseph Story to Henry Wheaton (Dec. 21, 1817), Wheaton Papers, *supra* note 1.

Wheaton's first response to the bar's dereliction in this regard was an abortive attempt at backscratching: he pressed Story to encourage his friend, Webster, to place an appropriately laudatory assessment of volume 2 of the *Reports* in Boston's *North American Review*, promising in return to ensure that the reports of Story's circuit court decisions would be "properly noticed" in New York. Henry Wheaton to Joseph Story (Aug. 1 & Nov. 6, 1817), Wheaton Papers, *supra* note 1. Story tried to deflect this ploy tactfully with the suggestion that Webster might not be the ideal reviewer for the volume in question: "probably he feels a little unpleasant from losing nearly all the causes which he argued" during the 1817 Term. Joseph Story to Henry Wheaton (Sept. 4, 1817), Wheaton Papers, *supra* note 1; see also Joseph Story to Henry Wheaton (Nov. 13, 1817), Wheaton Papers, *supra* note 1 (noting that "petty jealousy, local feeling, & narrow common law illiberality" in Massachusetts might indefinitely postpone a proper estimation of Wheaton's merits there).

Not satisfied, Wheaton proposed that Story confidentially prepare the desired review, omitting only a critical analysis of the doctrine and style of the opinions. These, Wheaton pledged to provide himself, "as I am willing to take my share of the sin of this *pious fraud*." Henry Wheaton to Joseph Story (Nov. 30, 1817), Wheaton Papers, *supra* note 1 (emphasis in original). Story pleaded the press of family and other matters in declining. Joseph Story to Henry Wheaton (Dec. 21, 1817), Wheaton Papers, *supra* note 1.

Ultimately, the press did notice Wheaton's *Reports* substantially in the manner he had hoped. Webster's review of volume 3, for example, while noting such blemishes as tediously long reports of cases turning primarily on evidentiary matters, praised Wheaton's notes as providing "an enlightened adaptation of the case reported, of the principles and rules of other systems of jurisprudence, or a connected view of decisions on the principal points, after exhibiting the subject with great perspicuity, and in a manner to be highly useful to the reader." 8 N. AM. REV. 63, 71 (1818). And the same publication's April 1824 number commended Wheaton as "a faithful and accomplished reporter" whose current volume "indicates the same care and industry, the same happy talent for discriminating the leading points in the evidence and the argument of

commendation to mirror the private praise that his efforts had already received, Wheaton soon found himself the victim of slow sales and unexpected financial difficulties. He had arrived in Washington convinced that his appointment as Reporter placed him "in the way to secure an honorable independence."²⁹⁵ Friends predicted that the profits derived from his new position would "treble those of [his] predecessors."²⁹⁶ Yet, from the very beginning, Wheaton found himself obliged to "anticipate this income by a loan of \$1000 for a year."²⁹⁷ Three years later, he still could not repay the loan. In regretting his inability to do so, he advised the lender: "I have not yet found the law a thrifty servant All my calculations as to pecuniary matters have been hitherto so erroneous that I will not now fix the epoch when you may certainly expect payment."²⁹⁸

Chief among Wheaton's erroneous calculations, obviously, had been his confidence in the salability of his volumes, incorporating as they did such significant improvements over those of his predecessors. There were other miscalculations, as will appear;²⁹⁹ but slow sales of the *Reports*, resulting in meager contracts with booksellers, were the foundation of Wheaton's misery. Mechanically, Wheaton himself did not profit directly from purchases of his volumes.³⁰⁰ Rather, he was paid a flat sum by his publishers, based on the anticipated popularity of each volume of his *Reports*. Wheaton's income from this source is listed below:

1 Wheat. (1816)	\$1200 ³⁰¹
-----------------	-----------------------

counsel, and the same skill in recording and illustrating them, which have characterized the preceding volumes of his reports." Untitled review, 18 N. AM. REV. 371, 372 (1824).

295. Henry Wheaton to Jonathan Russell (May 11, 1816), Wheaton Papers, *supra* note 1.

296. Charles J. Ingersoll to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1.

297. Henry Wheaton to Jonathan Russell (Nov. 28, 1816), Wheaton Papers, *supra* note 1.

298. Henry Wheaton to Jonathan Russell (Oct. 1, 1819), Wheaton Papers, *supra* note 1.

299. See text accompanying notes 312-43 *infra*.

300. Authors of more popular books sometimes did. Chief Justice Marshall's biography of George Washington, for example, brought the author and the copyright holder, Bushrod Washington, a total of one dollar per copy sold. Bushrod Washington to Elizabeth Hamilton (Dec. 14, 1819), Bartholf Collection of Hamilton and McLane Family Papers, Library of Congress, Washington, D.C. [collection hereinafter cited as Bartholf Collection] (advising the widow of Alexander Hamilton regarding a contract for the publication of Hamilton's biography by Joseph Hopkinson). Wheaton apparently lacked the clout to obtain so favorable an arrangement.

301. Contract between Henry Wheaton and Mathew Carey, *supra* note 217. Wheaton's first volume sold so badly that, five years later, Carey still had 200 copies lying about. Record, *supra* note 68, at 23-24 (evidence of H.C. Carey). In 1821, Carey assigned his interest under the contract (and sold the remaining 200 copies) to Robert Donaldson of New York, Wheaton's publisher for volumes 2 through 12. Wheaton, of course, took nothing by the assignment. Assignment by Mathew Carey & Sons to Robert Donaldson (Sept. 7, 1821), *reprinted in* Record, *supra* note 68, at 23. All of Wheaton's contracts for the publication of the remaining volumes of his *Reports* are likewise reproduced in the Record.

2 Wheat. (1817)	500 in law books ³⁰²
3 Wheat. (1818)	500
4 Wheat. (1819)	800
5 Wheat. (1820)	650
6 Wheat. (1821)	700
7 Wheat. (1822)	700
8 Wheat. (1823)	700
9 Wheat. (1824)	800
10 Wheat. (1825)	700
11 Wheat. (1826)	500
12 Wheat. (1827)	700

The sum obtained for volume 1 is deceptively high, as this constituted the only instance in which Wheaton sold the actual copyright to the volume, not just a license to print a specified number of copies.³⁰³ The purchase prices of volumes 4 and 9 are also somewhat inflated, due to the importance and notoriety of the cases decided during the 1819 and 1824 Terms.³⁰⁴ In addition to the listed sums (and the \$250 paid for a projected second edition of volume 2), Wheaton sold the rights to his *Digest of Decisions* for \$1200.³⁰⁵ Altogether, his twelve years of labor as Reporter brought him, from the sale of rights to his publications, a mere \$9900.³⁰⁶

Fortunately, not all of Wheaton's hopes for an "honorable independence" rested on the sale of his volumes. Two other prospects seemed, at least in 1816, to hold the promise of significant additional

302. Memorandum of Agreement between Cornelius S. Van Winkle and Charles Wiley, two New York printers, and Wheaton (Apr. 28, 1817), *reprinted in* Record, *supra* note 68, at 28. This time, Wheaton retained his copyright. He granted Van Winkle and Wiley only an exclusive license to print 1000 copies of his second volume, plus a right of first refusal on the second edition, if any. On the day following their contract with Wheaton, Van Winkle and Wiley conveyed all rights thereunder to Robert Donaldson. Memorandum of Agreement between Cornelius S. Van Winkle and Charles Wiley, and Robert Donaldson (Apr. 29, 1817), *reprinted in* Record, *supra* note 68, at 29. Apparently, Donaldson acted as Wheaton's publisher, but Van Winkle and Wiley did the actual printing. In 1827, Donaldson purchased from Wheaton for \$250 the right to print a second edition of volume 2. Memorandum of Agreement between Henry Wheaton and Robert Donaldson (June 23, 1827), *reprinted in* Record, *supra* note 68, at 29.

303. See text at notes 212-17 *supra*. Accordingly, Wheaton's claims in his lawsuit against Peters involved only volumes 2 through 12.

304. The 1819 Term included *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 578 (1819), *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). The 1824 Term featured *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Because the contracts between Wheaton and his publishers were generally not entered into prior to the Terms reported, the contract price could easily be made to reflect anticipated demand for each volume.

305. Contract between Henry Wheaton and Robert Donaldson (Aug. 29, 1820), Wheaton Papers, *supra* note 1. Wheaton offered to recompense Story, "in good law books," for his part in preparing the *Digest*. Henry Wheaton to Joseph Story (Oct. 11, 1819), Wheaton Papers, *supra* note 1. Whether Story accepted is unknown.

306. By contrast, John Marshall's *The Life of George Washington* generated at least \$11,000. Bushrod Washington to Elizabeth Hamilton (Dec. 14, 1819), Bartholf Collection, *supra* note 300.

revenues which might afford him, in short order, the comforts of a respectable income. One was the quest for professional retainers in connection with his annual pilgrimage to Washington. Surely, the visibility of his new position would guarantee a lively business as an advocate before the bar of the Court, whose judges and affairs he knew so intimately. The title page of Wheaton's *Reports*, unlike those of Dallas and Cranch, advertised the author as a "Counsellor at Law"; and his expertise in the law of prize, which made up such a large part of the Supreme Court's docket, was well known.

Wheaton's first year as Reporter, however, brought him only one retainer, and in a minor cause at that;³⁰⁷ and, in his second year, he had none. The 1818 Term, affording three opportunities to appear before the Court,³⁰⁸ brightened his spirits somewhat. He reported to his brother-in-law that he expected to receive "more than enough in fees in Court to pay all expenses coming here, staying, & returning"³⁰⁹ and would produce "a goodly volume, in which my own speeches will make no inconsiderable figure."³¹⁰ Any anticipation that the 1819 Term would see a swelling tide of business was quickly dashed, however: it brought but two retainers.³¹¹ And the following Term produced none whatsoever.

By now, Wheaton could see little point to being subtle or timid in the pursuit of increased employment. As he advised Story: "[U]nless I can get firmly *planted on my legs* as an arguer of causes, it will not be worth my while to pursue the thing [*i.e.*, to continue as Reporter]."³¹² Wheaton's professional announcement for 1819 advertised the availability of his services both in New York and "at the Supreme Court of the United States at Washington, which Mr. Wheaton regularly attends as a Counsellor, and the Reporter of its decisions."³¹³ Following

307. *The Antonia Johanna*, 14 U.S. (1 Wheat.) 159 (1816) (prize). Wheaton's argument occupied five and one-half pages of his report of the case; his opponent's, one and one-half pages; and Justice Story's opinion for the Court, three pages.

308. *The Aeolus*, 16 U.S. (3 Wheat.) 392 (1818) (nonimportation laws); *The Friendschaft*, 16 U.S. (3 Wheat.) 14 (1818) (prize); and *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818) (criminal jurisdiction of the federal courts, claimed by Wheaton to turn on the admiralty clause of the Constitution) (*see text at notes 193-95 supra*).

309. Henry Wheaton to Edward Wheaton (Feb. 21, 1818), Hay Library Papers, *supra* note 152.

310. Henry Wheaton to Edward Wheaton (Mar. 1, 1818), Hay Library Papers, *supra* note 152.

311. *The Friendschaft*, 17 U.S. (4 Wheat.) 105 (1819) (prize), and *The Langdon Cheves*, 17 U.S. (4 Wheat.) 103 (1819) (seizure).

312. Henry Wheaton to Joseph Story (Jan. 5, 1819), Wheaton Papers, *supra* note 1 (emphasis in original).

313. Announcement (Oct. 8, 1819), Wheaton Papers, *supra* note 1. Wheaton's new law partner, Elijah Paine, eventually played a significant part in the preparation and argument of *Wheaton v. Peters*. *See text at notes 469-80 infra*.

the barren 1820 Term, a despondent Wheaton frankly implored Story: "I pray you to bear me in mind on the Circuit for retainers above."³¹⁴ The result was a comforting but illusory upsurge of activity in 1821,³¹⁵ but then another Term with no retainers in 1822 and discouragingly minimal opportunities until his swan song as Reporter in the January 1827 Term.³¹⁶

Slow sales, infrequent retainers: a sad saga indeed, but by no means the full roll call of Wheaton's disappointments. To these must be added a blow, administered in the first, hopeful year of his reporter-ship, from which he never recovered. Then, he had enjoyed a third (and, it seemed, highly promising) prospect for attaining that "honorable independence" that both his pride and his pocketbook so clearly required. But, once again, reality fell short of anticipation.

Wheaton had arrived in Washington for his first year as Reporter not entirely unmindful that his predecessors had found the position highly unremunerative. Nothing he learned during the Court's 1816 sitting changed his mind. Concerning his finances, he remarked to one correspondent shortly after the Court rose that "the copy right alone [*i.e.*, income from the *Reports* themselves] will not indemnify me against the expense of time and money devoted to" reporting the cases in the manner he had pledged.³¹⁷ The solution, he thought, lay in a bill then pending before Congress to allow the Supreme Court officially to appoint its Reporter and to recompense him for his labors directly from the Treasury of the United States.

The proposal had antedated Wheaton's arrival by at least two years and presumably contributed to his willingness, as he said, "to undertake so irksome a task as that of reporting the decisions of a tribunal which sits in such a place as Washington."³¹⁸ The author of the proposal, not surprisingly, was Joseph Story. Story's interest in court reporting has already been noticed.³¹⁹ By 1814, there was precedent for the official appointment of a salaried reporter to the highest court of the state not only in Massachusetts (1803), but also in New York (1804), New Jersey (1806) and apparently Kentucky (1804) as

314. Henry Wheaton to Joseph Story (Oct. 10, 1820), Wheaton Papers, *supra* note 1.

315. Wheaton argued seven causes during the 1821 Term.

316. Two cases in 1823, one each in 1824 and 1825, two in 1826, and seven in 1827. Beginning in 1827, sittings of the Court convened on the second Monday of January. Act of May 4, 1826, ch. 37, § 1, 4 Stat. 160.

317. Henry Wheaton to John Sergeant (Apr. 20, 1816), Sergeant Papers, *supra* note 211.

318. Henry Wheaton to Charles J. Ingersoll (Jan. 6, 1817), Charles J. Ingersoll Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as Ingersoll Papers].

319. See text at notes 175-81 *supra*.

well.³²⁰ "Might not Congress be induced," Story asked Attorney General Rush in the summer preceding Cranch's final term, "to authorize the president to appoint a reporter for the U.S. with a proper salary, in the same manner as is done in Massachusetts & New York?"³²¹

The 1815 Term, however, slipped away without the introduction of the Reporter's Bill in Congress, and Cranch gave way to Wheaton. On February 20, 1816, within weeks of the beginning of Wheaton's first year as Reporter, the measure was proposed in the Senate by Wheaton's fellow Rhode Islander, William Hunter.³²² As introduced, S. 37 (*A Bill Providing for the publication of the Decisions of the Supreme Court of the United States*) would have required that the Reporter, to be appointed by the Court itself rather than the President, furnish to the United States within one year of the Court's rising an unspecified number of copies of the preceding Term's decisions, for distribution as Congress might direct. Also left unspecified was the Reporter's compensation, although the bill did clearly provide that the copies be delivered "free of charge" to the Secretary of State for the government's use.³²³

To the new Reporter, the situation must have seemed promising. He had no intention of dawdling, as Cranch had, in the publication of his volumes, and a year's time to place them in print would be more than ample. The delivery of copies to the United States, free of charge, might prove somewhat burdensome, but it would assure that the *Reports*, the foundation of Wheaton's enlarged reputation, received thorough circulation among the government's leading figures. As to salary, he had reason for great hope: William Johnson, Kent's reporter in New York, enjoyed an annual salary of \$2000.³²⁴

The Senate, however, imposed more stringent requirements than Wheaton had anticipated, and for a lesser compensation: fifty copies to be delivered to the Secretary of State within six months, with a salary to the Reporter of only \$1000.³²⁵ As amended and sent to the

320. The development of reporter systems in these and the remaining states of the Union during the early years of the nineteenth century is discussed in detail in *American Reports and Reporters*, 22 AM. JURIST & L. MAG. 108 (1839), edited by the redoubtable Charles Sumner (himself the Reporter for Story's First Circuit from 1830-39), and in a series of articles of the same title appearing in the *Albany Law Journal* between 1871 and 1872.

321. Joseph Story to Richard Rush (June 26, 1814), Rush Family Papers, *supra* note 181. Story had at first written that "the Supreme Court" should appoint the Reporter; but perhaps, on reflection, "the president" seemed a more politic suggestion.

322. 29 ANNALS OF CONG. 142 (1816).

323. S. 37, 14th Cong., 1st Sess. (1816).

324. Henry Wheaton to Jonathan Russell (Jan. 4, 1817), Wheaton Papers, *supra* note 1.

325. 29 ANNALS OF CONG. 181 (1816). S. 37 was amended by S. 57 on March 8, 1816 and, as amended, passed by the Senate and sent to the House on March 12, 1816. 29 ANNALS OF CONG. 184, 1202 (1816). The Senate's amendments also prescribed the various officers of gov-

House, the bill seemed likely to cause little controversy, and Wheaton was so confident of the result that he returned to New York immediately after the Court rose in March, rather than remaining in Washington to lobby for passage in the House. There, however, the bill met delay, to the great dismay of both Wheaton and Story.³²⁶ Their efforts to save the measure fell short, and the House postponed consideration of it indefinitely on April 29, 1816.³²⁷

Discouraged as he was that Congress should refuse him "so paltry a pittance" out of "gross mercenary selfishness,"³²⁸ Wheaton determined to succeed in the House in the lame duck session following the November elections. To that end, he enlisted the aid of John C. Calhoun, then a leader of administration forces in the House, who replied that he considered the reporting of Supreme Court decisions a matter of "national importance,"³²⁹ and of John W. Taylor of New York, later to be twice elected Speaker.³³⁰

Matters seemed to go well. By late December, Wheaton had no doubt that the bill would pass and began focusing his attention on obtaining revisions to make the end result more favorable. As it would be desirable for the United States to possess copies of his newly published first volume, he suggested to Taylor, ought not the bill to be made retroactive and provide the Reporter a salary for the year 1816? And ought not the salary provided be "adequate to the important nature of the object, scarcely less interesting than the promulgation of the Acts of Congress itself?" After deducting from the \$1000 pro-

ernment to whom the 50 copies should be distributed by the Secretary of State. S. 57, 14th Cong., 1st Sess. (1816).

326. *E.g.*, Henry Wheaton to John Sergeant (Apr. 20, 1816), Sergeant Papers, *supra* note 211 (fearing that the bill "may go over to the next Session if it is not attended to" and urging "the importance of a regular publication" of the Court's decisions); Joseph Story to Henry Wheaton (Apr. 11, 1816), Wheaton Papers, *supra* note 1 (suggesting that Wheaton place an article in the *National Advocate* supporting both the Reporter's Bill and a companion measure to raise the Justices' salaries, on grounds that "both of their objects are so purely national . . . that they ought to be put upon grounds of public policy"). Story's letter, discussed in text at notes 208-10 *supra*, also lamented that the appearance in the *Daily National Intelligencer* of Justice Johnson's concurrence in *Martin v. Hunter's Lessee*, rather than Story's opinion for the Court, might prejudice both measures in the House (where indeed they eventually expired from inattention). Clearly, the Court did not suppress Story's opinion. Professor William Crosskey's bizarre conjecture to the contrary, seeking an explanation for the initial failure of the Reporter's Bill in supposed nationalistic manipulations of the press by the *Martin* majority, is thus patently incorrect. 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES, app. G, at 1243-45 (1953).

327. 29 ANNALS OF CONG. 1458 (1816).

328. Henry Wheaton to Joseph Story (May 21, 1816), Wheaton Papers, *supra* note 1.

329. John C. Calhoun to Henry Wheaton (May 18, 1816), Wheaton Papers, *supra* note 1.

330. Henry Wheaton to John Taylor (Dec. 25, 1816), Wheaton Papers, *supra* note 1. Even Attorney General Rush came to Wheaton's aid, placing in the *Daily National Intelligencer* an anonymous article favoring the bill. Richard Rush to Henry Wheaton (Dec. 13, 1816), Wheaton Papers, *supra* note 1.

posed the sum of \$250 required to furnish fifty copies to the government (on the assumption that Wheaton could procure them for that purpose at \$5 each), there would be left to the Reporter for his time, effort and expenses just \$750!³³¹ But again, on the day after Christmas, the bill failed in the House, its opponents contending that the decisions of the Supreme Court were not entitled to the status of laws "binding on their successors and on other authorities," and that appointing a Reporter involved creating "a monopoly of a privilege . . . which ought to be free to all." In any event, "publication would afford sufficient emolument, unaided by a salary, from the extensive sale of the reports."³³² In the privacy of a letter to Wheaton, Story responded sharply: "Shame, shame on Congress, that the Reporter's bill should be lost. Are we indeed travelling back to the dark ages?"³³³

Wheaton, although beside himself with indignation, could hardly afford to sulk. His difficulties in finding a bookseller willing to publish volume 1 of his *Reports*, which had arrived in Washington too late to do him any good in the session just ended,³³⁴ made the necessity of pushing forward at once painfully clear. The argument most damaging to his cause in the House had been that, while a stipend might be necessary to encourage the publication of state reports, none was needed to ensure the prompt appearance of the Supreme Court's reports, due to their presumed wider circulation. "The truth," Wheaton cried in attempting to plant a rebuttal argument in the Philadelphia press, is that "the decisions of the U.S. court are only read by the most eminent of the profession in the great cities, whilst the State reports circulate throughout the most sequestered districts of the country."³³⁵ Johnson of New York might receive annually \$2000 in salary and \$2000 more from his publisher. But Cranch had never gotten more than \$1200 or \$1500 for his volumes; and Wheaton himself had been forced to take \$1200 in notes payable over a fifteen month period. Without some encouragement from the government, it would be difficult to find even one professional man — let alone the multiple competitors presupposed by the anti-monopoly argument — willing to serve in so unprofitable an office.³³⁶

In the third and final battle of the war for the Reporter's Bill, its

331. Henry Wheaton to John Taylor (Dec. 25, 1816), Wheaton Papers, *supra* note 1.

332. 30 ANNALS OF CONG. 366-67 (1816).

333. Joseph Story to Henry Wheaton (Jan. 8, 1817), Wheaton Papers, *supra* note 1.

334. See William Hunter to Henry Wheaton (Dec. 25, 1816), Wheaton Papers, *supra* note 1.

335. Henry Wheaton to Charles J. Ingersoll (Jan. 6, 1817), Ingersoll Papers, *supra* note 318.

336. *Id.*; see also Henry Wheaton to Jonathan Russell (Jan. 4, 1817), Wheaton Papers, *supra* note 1.

proponents rolled out their heaviest artillery. Immediately upon the introduction of S. 36 on January 31, 1817, Dudley Chase of the Senate Judiciary Committee wrote to Chief Justice Marshall, asking his views "relative to the object and utility of the proposed act."³³⁷ The views thus solicited can scarcely have been required to inform the Senate, where the bill had twice passed with minimal opposition. Transparently, Chase had provided the Court with an opportunity to go on record for the benefit of the House. Marshall was not long in responding. While supporting Wheaton on each of the points raised in the latter's own lobbying campaign, the Chief Justice's reply also attacked head-on the issue that Wheaton had conspicuously avoided, namely, the effect of the *Reports* on the institutional supremacy of the Supreme Court within the national judicial structure:

Sir:

Your letter . . . was yesterday received, and communicated to the judges. We all concur in the opinion that the object of the bill is in a high degree desirable.

That the cases determined in the Supreme Court should be reported with accuracy and promptness, is essential to correctness and uniformity of decision in all the courts of the United States. It is also to be recollected that from the same tribunal the public receive that exposition of the constitution, laws, and treaties of the United States as applicable to the cases of individuals which must ultimately prevail. It is obviously important that a knowledge of this exposition be attainable by all.

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.

From experience, the judges think there is much reason to apprehend that the publication of the decisions of the Supreme Court will remain on a very precarious footing if the reporter is to depend solely on the sales of his work for a reimbursement of the expenses which must be incurred in preparing it, and for his compensation. The patronage of the Government is believed to be necessary to the secure and certain attainment of the object.

Law reports can have but a limited circulation. They rarely gain ad-

337. John Marshall to Dudley Chase (Feb. 7, 1817), reprinted in 2 W. CROSSKEY, *supra* note 326, app. G, at 1246 (Marshall's reply).

mission into the libraries of other than professional gentlemen. The circulation of the decisions of the Supreme Court will probably be still more limited than those of the courts of the States, because they are useful to a smaller number of the profession. Only a few of those who practice in the courts of the United States, or in great commercial cities, will often require them. There is, therefore, much reason to believe that no reporter will continue to employ his time and talents in preparing those decisions for the press after he shall be assured that the Government will not countenance his undertaking.

With very great respect, I am, sir, your obedient servant,
John Marshall³³⁸

Predictably, the bill sailed through the Senate again on February 19, 1817. On March 1, it was at last approved by the House. And, on March 3, the Reporter's Bill was signed by the President and became law.³³⁹ Even in this long delayed victory, however, Wheaton had suffered two final buffets. First, the duration of the new Act was expressly limited to "three years, and no longer."³⁴⁰ Second, in finally agreeing to the bill, the House retained the \$1000 salary but increased the number of volumes to be provided by the Reporter to the United States from fifty to eighty, effectively decreasing Wheaton's "take-home pay" to \$600.³⁴¹ At best, then, the new salary might serve as "additional encouragement."³⁴² As he remarked to Story within six weeks of his supposed triumph (and in the midst of trying to arrange publication of his second volume without again relinquishing the copyright): "[I]f I do persevere, it will be against all odds."³⁴³

Wheaton did indeed decide to persevere as Reporter, but the odds against success (at least, financial success) were, as he saw, exceedingly

338. *Id.* Implausibly, Crosskey characterizes Marshall's position here as a retreat from, and "utterly impossible to reconcile with," his earlier view that the Supreme Court's decisions were binding on every other court, federal or state. *Id.* at 1245.

339. 30 ANNALS OF CONG. 132, 193, 1044 (1817). Act of Mar. 3, 1817, ch. 63, § 1, 3 Stat. 376.

Warren also makes reference to a *prior* enactment: "By Act of March 22, 1816, provision was made for the first time for an official publication of the decisions of the Court, but with no provision for a salary to the Reporter." 1 C. WARREN, *supra* note 12, at 455 n.1. The author has been unable to confirm the existence of the Act referred to and believes the citation to be erroneous.

340. During Wheaton's reportership, the Act of Mar. 3, 1817 was renewed three times. Act of May 15, 1820, ch. 131, § 1, 3 Stat. 606; Act of Mar. 3, 1823, ch. 34, §§ 1-3, 3 Stat. 768; and Act of Feb. 22, 1827, ch. 18, §§ 1-3, 4 Stat. 205. The last renewal is discussed in the text at notes 376-82 *infra*.

341. Same calculation as in text at note 331 *supra*. It appears from the contracts contained in the Record in *Wheaton v. Peters*, however, that Wheaton's publishers in each instance assumed the cost of providing the government its 80 copies. Record, *supra* note 68, at 30-40.

342. First of two pre-argument memoranda by Wheaton to Webster concerning the complainant's contentions in *Wheaton v. Peters* (Jan., 1834), Wheaton Papers, *supra* note 1 [hereinafter cited as Wheaton's Pre-Argument Memorandum A].

343. Henry Wheaton to Joseph Story (Apr. 17, 1817), Wheaton Papers, *supra* note 1.

long. At the outset, he had given himself five years to attain his goals.³⁴⁴ Within three months of the conclusion of his first Supreme Court Term, however, he had been forced to surrender the copyright to volume 1 of his *Reports*, at a price he considered wholly inadequate, simply to place it in print. Within little more than a year, he had seen his hopes of all but a meager salary dashed by a penurious Congress. With each passing year, his failure to attract more than a handful of retainers became a source of increasing embarrassment. By his fourth year, he felt driven to confess to his mentor, Story, that only the latter's "cheering admonitions" prevented him from becoming "quite sick of 'literary fame & glory,' " which brought with it so little "of 'the one thing [truly] needful.' "³⁴⁵ In many ways, it seems surprising that Wheaton stuck to the five-year plan he had laid out for himself, and more wondrous still that he stayed the course seven years beyond even that.

The sad truth seems to be that Wheaton could find little better to do. In 1819, he sought both an appointment to the Spanish Claims Commission³⁴⁶ and a commissionership under the anticipated national bankruptcy act,³⁴⁷ but failed to obtain either. In 1821, he secured election to the New York State Constitutional Convention, a gratifying but hardly remunerative accomplishment.³⁴⁸ In 1823, he received prominent mention as a possible successor to the deceased Justice Brockholst Livingston; but the post went instead to his fellow New Yorker, Smith Thompson.³⁴⁹ By year's end, Wheaton had embarked "on the tempestuous ocean of politics,"³⁵⁰ winning a seat in the New York Assembly.³⁵¹ He passed up an opportunity to run for Speaker, however, in part to return to Washington in 1824³⁵² to help Webster argue a constitutional case that he hoped would make his

344. Henry Wheaton to Joseph Story (Dec. 19, 1816), Wheaton Papers, *supra* note 1.

345. Henry Wheaton to Joseph Story (Aug. 30, 1819), Wheaton Papers, *supra* note 1.

346. Henry Wheaton to Joseph Story (Mar. 24, 1819), Wheaton Papers, *supra* note 1 (request for assistance). As contemplated, the Board of Commissioners would have resolved claims arising out of Spain's recent war with her American colonies. Ratification and implementation of the treaty lagged, however, and Wheaton lost his opportunity.

347. Henry Wheaton to Joseph Story (Nov. 28, 1819), Wheaton Papers, *supra* note 1 (another plea for Story's aid, which came to nothing when the bankruptcy act failed in Congress).

348. See E. BAKER, *supra* note 130, at 39-43.

349. *Id.* at 64; Scott, *supra* note 133, at 265. Ironically, Wheaton was again touted for the Supreme Court upon Thompson's death in 1843 but was again disappointed: the seat went to yet another New Yorker, Samuel Nelson. 2 C. WARREN, *supra* note 12, at 114, 119.

350. Henry Wheaton to Joseph Story (Nov. 10, 1823), Wheaton Papers, *supra* note 1.

351. See E. BAKER, *supra* note 130, at 44-54.

352. Wheaton arranged for David Hoffman of Baltimore to act as the surrogate Reporter during his own absence in Albany. Henry Wheaton to Daniel Webster (Nov. 30, 1823), Webster Papers, Library of Congress, Washington, D.C.

fame as an advocate.³⁵³ The case in question, *Ogden v. Saunders*, ended up being put over until Wheaton's last year as Reporter, when his and Webster's arguments were rejected by the Court on a four to three vote.³⁵⁴

The remainder of 1824 brought further politicking in New York, where Wheaton had committed the twin strategic errors of aligning himself against the DeWitt Clinton forces³⁵⁵ and supporting the presidential ambitions of John C. Calhoun.³⁵⁶ Clinton overwhelmed all opposition in the November elections, and John Quincy Adams, to whose banner Wheaton belatedly rallied,³⁵⁷ ultimately won the presidency in the House of Representatives. Wheaton's own bid for a seat in the House was unsuccessful.³⁵⁸ By the beginning of 1825, he had emphatically "tire[d] of the mechanical drudgery of reporting." To his brother-in-law, Edward, he promised soon to test the professed "zeal and ability" of his friends to assist him in securing a higher station.³⁵⁹ His connections, however, failed to secure him missions to Mexico, South America or The Netherlands;³⁶⁰ and the sole appointment he did obtain, as one of three revisors of New York's statute laws, appears never to have fully engaged his interest.³⁶¹

The nadir came in 1826. Wheaton sought but failed to obtain appointment to the Supreme Court upon the death of Thomas Todd.³⁶² He tried to secure an opening in the office of United States Attorney in

353. Henry Wheaton to Levi Wheaton (Mar. 5, 1824), cited in E. BAKER, *supra* note 130, at 63 n.1.

354. 25 U.S. (12 Wheat.) 213 (1827). Under the Judiciary Act of 1789, the Court was composed of six members. Judiciary Act of Sept. 24, 1789, ch. 20, § 1, 1 Stat. 73 (1789). Congress increased the size of the Court to seven in 1807, Act of Feb. 24, 1807, ch. 16, § 5, 2 Stat. 421, and to nine in 1837, Act of Mar. 3, 1837, ch. 34, § 1, 5 Stat. 176.

355. See E. BAKER, *supra* note 130, at 55-62.

356. Lawrence, *supra* note 128, xlix-1.

357. *E.g.*, Henry Wheaton to Edward Wheaton (Jan. 11, 1825), Wheaton Papers, *supra* note 1.

358. Lawrence, *supra* note 128, at li.

359. Henry Wheaton to Edward Wheaton (Jan. 11, 1825), Wheaton Papers, *supra* note 1.

360. See E. BAKER, *supra* note 130, at 74.

361. *Id.* at 71-73. Wheaton described the project to Story as "fill[ing] up the lacunae" left by the legislature in certain areas and "simplifying the practice" in others, rather than as a wholesale revision of existing law. Henry Wheaton to Joseph Story (Sept. 19, 1825), Wheaton Papers, *supra* note 1. Story, who appears in this correspondence in the character of a progressive law reformer, favored a comprehensive codification of the common law. Such an undertaking, he believed, would "reduce to certainty, method, & exactness much of the law, already relied upon by judicial tribunals, & thus give to the public the means, within a reasonable compass, of ascertaining their own rights & duties in many of the most interesting concerns of human life." Joseph Story to Henry Wheaton (Oct. 1, 1825), Wheaton Papers, *supra* note 1. Wheaton resigned from the project, prior to its completion, to accept his appointment to the Danish court. Lawrence, *supra* note 128, at lii-liii; see text at notes 366-71 *infra*.

362. E. BAKER, *supra* note 130, at 75. The seat went to Robert Trimble.

New York City through the forced removal of the incumbent, but that campaign, too, fell short.³⁶³ And in December came the blow that he found "more difficult" to accept than any other: the rejection by President Adams of his candidacy to succeed William P. Van Ness as District Judge for the Southern District of New York, an appointment of which he had felt virtually assured.³⁶⁴ Even in a year so full of humiliation, it must have pained Wheaton deeply to confess in a letter imploring the great Webster's aid: "If it were not *absolutely necessary* to me, you would not find my name on the list of *office seekers*. If I could live over again the years that are past, those who are in power should not know me in that character."³⁶⁵ When, on March 3, 1827, Adams announced his intention to name Wheaton chargé d'affaires to Denmark, a post so minor as to amount almost to a slap in the face, Wheaton's acceptance was nevertheless a forgone conclusion. After requesting "three or four months" to afford the prospect due consideration, he gratefully accepted Adams' proffered crumb barely four weeks later.³⁶⁶

Story had predicted the outcome to his wife within days of Adams' offer.³⁶⁷ The reportership, as Wheaton himself said, had been "good in its day," but he had made it widely known that he felt he was "born for better things."³⁶⁸ Yet, if he reflected at all objectively in the summer of 1827, Wheaton must have allowed himself some little satisfaction in the accomplishments of the twelve years just past. True, there had been isolated criticisms of his work in the preceding year.³⁶⁹ But

363. See, e.g., Henry Wheaton to John W. Taylor (Congressman from New York, Wheaton's ally in the old Reporter's Bill days and now Speaker of the House) (Mar. 29, 1826), Wheaton Papers, *supra* note 1.

364. Catherine Wheaton to Levi Wheaton (Dec. 31, 1826), Wheaton Papers, *supra* note 1. Adams instead named Samuel Rossiter Betts, a "Bucktail" Republican whose appointment the President apparently deemed more likely to counteract the worrying attachment of New York Republicans to Adams' rivals, Henry Clay and William Crawford. Martin Van Buren to J.A. Hamilton (Dec. 20, 1826), Library of Congress, Washington, D.C.

365. Henry Wheaton to Daniel Webster (Apr. 12, 1826), Webster Papers, Library of Congress, Washington, D.C. (emphasis in original).

366. See Henry Wheaton to Levi Wheaton (Apr. 7, 1827), Wheaton Papers, *supra* note 1 (reporting that he had, within the preceding week, written to President Adams and Secretary of State Clay "signifying my acceptance"). In actuality, Wheaton had rationalized acceptance within a week as a stepping stone to other appointments. Henry Wheaton to Levi Wheaton (Mar. 10, 1827), Wheaton Papers, *supra* note 1. And, within three weeks, he had "made up [his] own mind to do it." Henry Wheaton to Levi Wheaton (Mar. 10 & 25, 1827), Wheaton Papers, *supra* note 1. Only wounded pride seems to have delayed him from embracing the opportunity at once.

367. Joseph Story to Sarah Story (Mar. 8, 1827), Story Papers, University of Texas Library, Austin, Texas [collection hereinafter cited as Story Papers, Texas].

368. Henry Wheaton to Edward Wheaton (Jan. 11, 1825), Wheaton Papers, *supra* note 1.

369. See text at notes 376-82 *infra* (concerning deliberation on renewal of the Reporter's Act in 1826-1827); text at notes 241-49 *supra* (concerning Justice Johnson's attack on Wheaton's reporting in *Ramsay v. Allegre*).

these were minor alongside the vast advances in completeness, accuracy, promptitude and scholarship that Wheaton's *Reports* constituted in comparison with his predecessors' volumes. In accepting Wheaton's resignation, Chief Justice Marshall wrote:

I can assure you of my real wish that the place you have resigned had been more eligible [*i.e.*, remunerative], and had possessed sufficient attractions to retain you in it. I part with you with regret, and can assure you that I have never in a single instance found reason to wish your conduct different from what it was.³⁷⁰

III. *WHEATON V. PETERS*

When at last it came in June of 1827,³⁷¹ Wheaton's notice of resignation surprised neither the Court nor his eventual successor, Richard Peters, Jr., of Philadelphia. Indeed Peters, who had edited Bushrod Washington's reports of his decisions in the Third Circuit,³⁷² began campaigning for the post almost a year before, when Wheaton's flurry of activity as an office seeker seemed likely (if only because of the law of averages) to presage his departure from the Court. Peters' eagerness for the appointment, however, while superficially resembling Wheaton's quest a dozen years before, sprang from motives significantly different in character. Wheaton's interests had been predominantly, albeit not exclusively, scholarly in nature. True, he had cherished ambitions for appointment to higher office, even to the Court itself. True, he had hoped for greater financial rewards than he ultimately achieved. But Wheaton's successes had been primarily as a scholar, because it was there that his talents lay. Peters, too, had ambitions, but not to be a scholar. Above all else, he saw court reporting as an entrepreneurial venture. He seems not to have viewed his appointment as a steppingstone to still loftier heights,³⁷³ nor did he see it

370. John Marshall to Henry Wheaton (June 21, 1827), Wheaton Papers, *supra* note 1.

371. Henry Wheaton to John Marshall (June 6, 1827) (original letter has been lost, but is referred to in Marshall's reply to Wheaton dated June 27, 1827, The Pierpont Morgan Library, New York City). Wheaton had accepted the Danish mission two months before officially advising Marshall of his retirement as Reporter. *See* note 366 *supra*.

372. "The decisions [of the Third Circuit] from 1803 to 1827 were reported by Bushrod Washington . . . and published in four volumes, under the editorial supervision of Richard Peters, jr. [sic]." *American Reports and Reporters*, 22 AM. JURIST & L. MAG. 108, 112 (1839). Peters apparently prepared the reports, which appeared between 1826 and 1829, from Washington's old manuscript opinions. *See* Richard Peters, Jr., to Joseph Story (June 28, 1824), Story Papers, Library of Congress, Washington, D.C. [collection hereinafter cited as Story Papers, Washington, D.C.] (seeking Massachusetts subscriptions).

373. Peters had the good fortune to be the son of Richard Peters, Sr., a member of the Continental Congress who later served as United States District Judge for the District of Pennsylvania from 1792 until his death in 1828. The younger Peters was born in Philadelphia in 1780, making him five years older than Henry Wheaton. In contrast to Wheaton, Peters was not an inveterate office seeker. He did hold the post of Philadelphia County Solicitor from 1822 to 1835, and he helped to found the Philadelphia Savings Bank. In the main, however, Peters kept

as a vehicle to rationalizing and improving the law through his own erudite contributions.³⁷⁴ Rather, Peters' central perception of the reportership appears to have been that, properly managed, the job could be made to pay. In seeking to exploit that potential, he was to increase dramatically the profession's access to the Court's decisions, both at the practical level of decreased expense and as a matter of legal doctrine.

Peters' route to the reportership, although tortuous, demonstrates the intensity of his desire to succeed the disheartened Wheaton. Indeed, Peters may have contributed to Wheaton's woes and his determination to make his exit at the first reasonably remunerative opportunity.³⁷⁵ While the matter cannot be concluded with certainty, the evidence strongly suggests that, as early as 1826, Peters had participated in a scheme to oust Wheaton as Reporter, a scheme that

a remarkably low profile for one favored with his father's connections and occupied himself largely with court reporting. As District Judge, Peters, Sr., served on the Third Circuit with Bushrod Washington. Together, the two assisted Peters, Jr., materially at every level of his professional advancement. The son's progress proved steady but not spectacular. For example, whereas Wheaton had assumed the reportership at the relatively early age of 30, Peters, Jr., did not become Reporter until he was 47. H. CARSON, *supra* note 12, at 623; 14 *DICTIONARY OF AMERICAN BIOGRAPHY* 509-10 (1934) (biography of Peters, Sr.). But even this last appointment did not bring Peters, Jr., respect in the eyes of his peers. Visiting the City of Brotherly Love shortly after the conclusion of Peters' first year as Reporter, William Wirt found him "rather infirm of intellect and garrulous," but willing to bear the condescension of the grandees of Philadelphia society because "[he] is sensible that he cannot keep his place in their circle on any other terms." William Wirt to Elizabeth Wirt (his wife) (Apr. 27, 1828), Wirt Papers, Maryland Historical Society, Annapolis, cited in White, *supra* note 214.

374. Peters' literary accomplishments, while scarcely rivaling Wheaton's *Elements of International Law* (1836) and *History of the Law of Nations* (1845), were not confined to his reports of the Third Circuit and the Supreme Court. Early in his career, he began collecting the opinions of his father's court on matters of maritime law, a project that led to the publication in 1807 of *Admiralty Decisions in the District Court of the United States for the Pennsylvania District*. Richard Peters, Jr., to Samuel Hopkins (Nov. 15, 1805), Peters Papers, *supra* note 46; cf. 14 *DICTIONARY OF AMERICAN BIOGRAPHY* 509 (1934) (attributing the admiralty reports to Richard Peters, Sr.). Following the War of 1812, he expanded the scope of his reporting efforts through the preparation of *Reports of Cases in the Circuit Court of the United States for the Third Circuit . . . District of New Jersey, 1803 to 1818, and in the District of Pennsylvania, 1815-1818* (1819). 14 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra*, at 510. In 1819, Peters published a new three-volume edition of *Chitty on Bills of Exchange*. H. CARSON, *supra* note 12, at 623. These activities, perhaps combined with his father's friendship with Justice Washington, undoubtedly helped to bring Peters, Jr., to Washington's attention as a possible editor for *Reports of Cases . . . in the Circuit Court of the United States, for the Third Circuit . . . from the Manuscripts of . . . Bushrod Washington* (1826-29). 14 *DICTIONARY OF AMERICAN BIOGRAPHY*, *supra*, at 510. The grateful Washington felt moved to assist Peters in his attempts to succeed Wheaton as Reporter. See text at notes 386-91, 395-97 *infra*. As Peters' contribution to the *United States Reports* shows, however, his mind lacked the intellectual breadth and acuity so pronounced in Wheaton's. See text at notes 409-13 *infra*.

375. In predicting Wheaton's acceptance of the Danish mission, Story had perceptively identified its attractions. It was, he told his wife, merely a "respectable" appointment, but one providing "a salary of [\$]4500 per annum & an outfit for the mission of the same sum." Joseph Story to Sarah Story (Mar. 8, 1827), Story Papers, Texas, *supra* note 367. Wheaton's annual income as Reporter, counting both his salary and his contracts with publishers, had never exceeded \$1800 even in 1819 and 1824, his best years. See text at notes 300-04, 341 *supra*.

(although it failed in its immediate object) resulted in decreasing substantially the appeal of Wheaton's *Reports* to his publisher.

The incident in question concerned the third renewal of the Reporter's Act that Wheaton had first secured, with such great labor, in 1817.³⁷⁶ The Act had been routinely renewed in 1820 and 1823, in each instance for three years.³⁷⁷ Wheaton undoubtedly expected the Act's third renewal in 1826 to proceed without incident, given the vast improvements he had effected in the *Reports*. By January of that year, however, he had encountered the first rumblings of congressional dissatisfaction with existing provisions for the work. The complaints centered on the expense of the *Reports*, hardly a defect originated by Wheaton but certainly one to which his scholarship had significantly contributed. In replying to a House inquiry concerning "the expediency of providing for the more general, & permanent, & less expensive publication . . . of the Reports of the Decisions of the Supreme Court of the United States," Wheaton reluctantly admitted that "the price of the work" was "beyond that of publications not professional, & perhaps somewhat beyond law works in general." But he argued, with conviction based on bitter personal experience, that no person "competent to the task" could have achieved more: it was "obviously impossible to give the publication of a technical work like this a popular character or a very extensive circulation. Books of law reports, be they published in a form ever so cheap or even mean, will only be read by professional men," whose numbers Wheaton's best efforts had proven to be disappointingly small.³⁷⁸

Wheaton's reply might well have concluded the House inquiry, barring further developments. After all, the merits of his *Reports* had not gone completely unnoticed by the bar; and the Chairman of the House Judiciary Committee, which had ultimate responsibility for proposing a new Reporter's bill, was Wheaton's sometime friend, Daniel Webster. Within weeks of Wheaton's firm rejoinder, however, Webster received a confidential memorandum from Wheaton's old publisher, Carey & Lea of Philadelphia, proposing to renew Carey & Lea's responsibility for publication of the *Reports*, but under a new arrangement and with a different Reporter. The arrangement offered by Carey & Lea would result, according to the proposal, in reports "as

376. See text at notes 317-43 *supra*.

377. Act of May 15, 1820, ch. 131, § 1, 3 Stat. 606; Act of Mar. 3, 1823, ch. 34, §§ 1-3, 3 Stat. 768, cited in Record, *supra* note 68, at 47 (extending period for publication of reports to nine months).

378. Henry Wheaton to Edward Everett (Chairman of the House Committee on the Library) (Jan. 17, 1826), Wheaton Papers, *supra* note 1.

full as those heretofore published," put to press "within as short a period after the close of the Session as they have usually been," and "printed handsomely, on paper equally good with the volumes of Wheaton's Reports — bound in calf." Moreover, they would be "delivered to the profession at five dollars per volume," thereby stimulating circulation and greatly increasing the publishers' income. So confident were Carey & Lea that sales could be "doubled within 3 years" that they would agree to "provide a Reporter, at their own cost" and without benefit of a salary from the government. Carey & Lea's choice for the position would be subject, of course, to the Court's approval; and they expressed confidence "that the gentleman whom they first propose, would be in the highest degree satisfactory, as he is already by his publications advantageously known to the profession, which have rec[eive]d the unqualified approbation of a distinguished member of the Court."³⁷⁹ The name of Carey & Lea's likely nominee, a Philadelphian well known to Justice Washington through his editorship of Washington's Third Circuit reports, can hardly have been other than Richard Peters, Jr.

Carey & Lea's proposal to Webster, although confidential, found its way to Wheaton for response. However tired of the Reporter's tasks he might be, Wheaton could hardly allow himself to be supplanted abruptly and without alternative employment firmly in hand. The solution, although bitterly painful, was obvious. If the House's chief worry was the expense of the *Reports*, the expense of the *Reports* must be reduced. In his own hand, Wheaton drafted and submitted to Webster a new bill, retaining the Reporter's salary but adding the critical proviso "that the said decisions shall be sold to the public at large at a price not exceeding Five Dollars per volume."³⁸⁰ In the end, Wheaton obtained his victory over Carey & Lea, but it was a victory both costly and delayed. Nearly a year passed before Congress at last approved the new Reporter's Act;³⁸¹ and only by a special appropriation made weeks later did Wheaton finally secure \$1000 in salary for the eleventh volume of his *Reports*.³⁸²

The principal victim of all this maneuvering appears to have been Wheaton's publisher, Donaldson, who blasted the new law as an "un-generous act . . . occasioned by the unmanly misconduct of other

379. Carey & Lea's Proposal, Mar. 28, 1826, H. 187, 19th Cong., 1st Sess. (Judiciary Committee Files, U.S. House of Representatives, Washington, D.C.) [hereinafter cited as Carey & Lea's Proposal].

380. *Id.*

381. Act of Feb. 22, 1827, ch. 18, §§ 1-3, 4 Stat. 205 (also restoring the requirement of publication within six months).

382. Act of Mar. 2, 1827, ch. 23, § 1, 4 Stat. 213.

Booksellers' and renounced any intent to participate further in the publication of the Court's decisions.³⁸³ The chief beneficiary of Carey & Lea's proposal, at least potentially, was the profession at large. The price of a current individual volume of the Court's *Reports* had been reduced, at a single stroke, to a level not seen since Dallas' time.³⁸⁴ Yet the advance marked by the Act of February 22, 1827 fell far short of resolving the long-standing problem of the *Reports'* unmanageable expense, for it in no way reduced the combined expense of the two dozen volumes already in print. That circumstance would provide the necessary predicate to the actions by Peters that shortly brought him into legal controversy, and finally a climactic contest at the bar of the Court itself, with his predecessor, Wheaton.

For the moment, Wheaton remained Reporter. But for how long? As the summer and fall of 1826 brought seemingly brightened prospects for Wheaton's deliverance from that servitude,³⁸⁵ Peters began to imagine that his own appointment as Reporter might be imminent. All depended on Wheaton's nomination to succeed Judge Van Ness in the Southern District of New York, yet both men presumed that act to be a mere formality on the part of President Adams. Accordingly, Peters began an energetic campaign to line up the votes necessary to replace Wheaton upon the latter's inevitable resignation. The support of Justice Washington, whose circuit court reports Peters had just begun sending to the press, seemed certain. Justice Story, who had corresponded with Peters about securing Massachusetts subscriptions for the same reports,³⁸⁶ seemed the next most likely target, and Peters wrote to him immediately upon hearing the rumors of Wheaton's impending translation to the New York judgeship.³⁸⁷ Story replied upon receipt, promising: "[Y]ou shall cheerfully have my vote. . . . I know no person who would be more acceptable to me."³⁸⁸ Peters knew Chief Justice Marshall less well. Good strategy, then, dictated a less direct approach, first through the agency of Justice Washington and then by forwarding to Marshall, together with his own cover letter, a

383. Robert Donaldson to Richard Peters, Jr. (Nov. 13, 1827), Peters Papers, *supra* note 46.

384. *See* text at notes 66-68, 104 *supra*.

385. *See* text at notes 362-64 *supra*.

386. *See* note 372 *supra*.

387. Richard Peters, Jr., to Joseph Story (Sept. 22, 1826), Peters Papers, *supra* note 46.

388. Joseph Story to Richard Peters, Jr., (Sept. 25, 1826), Peters Papers, *supra* note 46. In fact, a "more acceptable" candidate quickly appeared in the person of Simon Greenleaf, one of Story's favorite protégés. Had he even "suspected" that Greenleaf would be a candidate, an embarrassed Justice advised the Maine Reporter (and later, Royall Professor at Harvard), "I need hardly say that I should not have hesitated to have given you all my aid." Joseph Story to Simon Greenleaf (Oct. 10, 1826), Simon Greenleaf Papers, Harvard Law School Library, *cited in* G.E. WHITE, *supra* note 214.

plea from old Judge Peters himself.³⁸⁹ Like Story, Marshall capitulated at once, replying to Peters' *father*, rather than the applicant himself, that the younger Peters "may be assured of my cordial support."³⁹⁰ The fourth and final vote necessary for Peters' majority proved surprisingly easy to obtain. Justice Duvall, having already been softened on the subject by another of Bushrod Washington's letters, decided to break his "general rule [of holding himself] disengaged until the day of election" and endorse Peters' appointment out of a settled conviction "that no one better qualified will be presented as a candidate."³⁹¹

It was all but done — all but done, that is, except for the inconvenient fact that, in the end, Van Ness' place went to another and a desolate Wheaton found himself compelled, as usual, to present himself for duty during the Court's 1827 Term. "Had the P[re]s[iden]t made the appointment which was anticipated," wrote Washington to Peters, "both offices would have been well filled, & I sincerely regret that he did not."³⁹²

Peters had suffered another temporary setback, but one not likely to dissuade so determined an applicant for long. Adams' offer on March 3, 1827 to make Wheaton *chargé d'affaires* to Denmark brought renewed hope. Upon hearing the news in Philadelphia, Peters again swung into furious action. He assured Justice Washington that Wheaton's acceptance of the proffered post admitted of "no doubt" and requested Washington's "kind publication [to the other members of the Court] of my wishes to become his successor."³⁹³ Perhaps to ensure the fulfillment of that wish, Peters also wrote at once to Wheaton. After reciting the "express promises" of Marshall, Story, Washington and Duvall in support of his candidacy, Peters offered to Wheaton (who, at this point, had not yet accepted the mission to Denmark) the following proposition: Peters would repair at once to Washington and "undertake to publish for [Wheaton] the reports of this Session of the Court, either for your exclusive benefit, or on such terms as you may yourself propose."³⁹⁴ Wheaton decided to publish his own reports of the 1827 Term.

Peters' second campaign for appointment achieved no more imme-

389. Richard Peters, Jr., to John Marshall (Sept. 30, 1826), Peters Papers, *supra* note 46.

390. John Marshall to Richard Peters, Sr., (Oct. 2, 1826), Peters Papers, *supra* note 46.

391. Gabriel Duvall to Richard Peters, Jr., (Nov. 3, 1826), Peters Papers, *supra* note 46.

392. Bushrod Washington to Richard Peters, Jr., (Jan. 28, 1827), Peters Papers, *supra* note 46.

393. Richard Peters, Jr., to Bushrod Washington (Mar. 5, 1827), Peters Papers, *supra* note 46.

394. Richard Peters, Jr., to Henry Wheaton (Mar. 5, 1827), Peters Papers, *supra* note 46.

diate success than his first, but it does shed light on the sort of reportership he contemplated once the prize was his. The sticking point this time around, and one Peters had anticipated by his attempts to adorn his candidacy with the mantle of inevitability, seems to have been the perceived collegial imperative of unanimous election by all seven members of the Court. Four votes were assured, including the powerful triumvirate of Marshall, Story and Washington. Of the remaining three Justices — Smith Thompson, Robert Trimble and William Johnson — apparently the main obstacle to success in Peters' quest was the irascible Johnson. After dispatching his first flurry of letters to individual members of the Court, Peters made a flying trip to the Capitol to assess the situation at closer range. There he learned from Bushrod Washington of Johnson's adamant insistence that Wheaton's successor reside in the District of Columbia, both to achieve greater economy in printing and to facilitate ready consultation of case records with a view toward "greater accuracy" in the *Reports*.³⁹⁵ On returning to Philadelphia, Peters quickly devised a strategy to nip Johnson's objections in the bud. His response took the form of a letter to the ever-obliging Washington, for use in the latter's conversations with Johnson. As to expense, Peters asserted that the cost of printing in the District ran "thirty and fifty per cent beyond that of Philadelphia and New York." As to accuracy, Peters informed Washington that he as Reporter could always consult the records of the Court at Term's end before leaving for Philadelphia in those instances "when dates and similar particulars are stated in general terms by the Court, and minute details of them may be required in the report of the Case."³⁹⁶

Moreover, Peters had already formulated an elaborate plan for publication that he viewed as a distinct improvement over Johnson's suggestions. During each sitting of the Court, Peters promised to employ a clerk to transmit copies of the decisions, as prepared by Peters, to his publisher in Philadelphia at each week's end. By the close of the following week, the printer would return to Peters in Washington proof copies of the preceding week's cases, which he would then correct and retransmit to Philadelphia. By the end of the third week, Peters would receive and circulate to each member of the Court the

395. See Richard Peters, Jr., to Bushrod Washington (Mar. 13, 1827), Peters Papers, *supra* note 46 (summary of Peters' prospects for appointment, including information provided by Washington himself). Johnson's obsession with accuracy in all probability reflects his 1827 dispute with Wheaton on that same subject, as revealed by his concurrence in *Ramsay v. Allegre*. See text at notes 241-45 *supra*.

396. Richard Peters, Jr., to Bushrod Washington (Mar. 13, 1827), Peters Papers, *supra* note 46.

finished product for “perusal *in type* of their opinions before publication.” Such an arrangement, he confidently asserted, would assure accuracy and “the Satisfaction of the Judges.” Peters asked Washington to describe these plans to his brethren.³⁹⁷

Unhappily for Peters, even his alluring prospectus of better things to come could not persuade the Court to fill a vacancy that had not yet occurred;³⁹⁸ and, by the time Wheaton finally announced his leaving to Chief Justice Marshall in June, the Court had already been in recess for almost three months. Still, as the Justices prepared to return for the January 1828 Term, Story felt sufficiently sure of Peters’ appointment to offer to ride together to Washington, predicting: “[Y]ou will find yourself *located* [there] for the winter.”³⁹⁹ Within the month, Peters had indeed been named Reporter, apparently as he had hoped, by unanimous vote of the Court.⁴⁰⁰ At a party of his Philadelphia friends given by the Careys, “it was confidently asserted by several, that [the office] would yield [him] more than \$5000 per annum.”⁴⁰¹ The new Reporter himself did not attend, as he was already on the job in Washington.

From the start, the Court’s fourth Reporter diligently undertook to implement the *modus operandi* promised in his “prospectus” to Justice Washington.⁴⁰² The end of the Term brought a flurry of activity, culminating in the publication of Peters’ first volume of *Reports* on June 16, 1828.⁴⁰³ The brief preface to this volume set forth its au-

397. *Id.*

398. See Richard Peters, Jr., to Bushrod Washington (Mar. 8, 1827), Peters Papers, *supra* note 46 (pressing for conditional appointment in expectation of Wheaton’s resignation).

399. Joseph Story to Richard Peters, Jr. (Dec. 15, 1827), Peters Papers, *supra* note 46 (emphasis in original).

400. See C.C. Biddle to Richard Peters, Jr. (Jan. 25, 1828), Peters Papers, *supra* note 46 (congratulating Peters on his success).

401. C.C. Biddle to Richard Peters, Jr., (Jan. 22, 1828), Peters Papers, *supra* note 46. This estimate, in terms of income from Peters’ initial *Reports*, proved to be wildly optimistic, although he made every effort to reduce the cost of printing the volumes. See text at note 408 *infra*. Peters’ plans to make the reportership a paying proposition also included condensing and republishing the decisions reported by his predecessors. See text at note 423 *infra*. Finally, Peters had in mind a modest scheme for restructuring the Reporter’s compensation which, if adopted, would surely have made him a wealthy man. See text at notes 418-21 *infra*.

While ingenious, these plans must have appeared to Peters’ friends, the Careys, much less solidly lucrative than the terms proposed by them to the government in 1826. At the time of their proposal, Carey & Lea had been “almost willing to engage under a forfeiture” in the publication of the *Reports*. Carey & Lea’s Proposal, *supra* note 379. Deprived of the control that adoption of their proposal would have afforded, Carey & Lea apparently decided thereafter, purely as a business matter, that Peters’ *Reports* should be published by others. See, e.g., Robert Donaldson to Richard Peters, Jr., (Nov. 13, 1827), Peters Papers, *supra* note 46 (declining to become Peters’ publisher and “wishing [him] better success than [his] predecessor”).

402. Richard Peters, Jr., to Joseph Hopkinson (Jan. 25, 1826), Peters Papers, *supra* note 46 (describing work routine).

403. Of his predecessor’s 12 volumes, only volume 10 had appeared more quickly (June 2,

thor's aims in crisp, businesslike fashion. "[I]t has been the [Reporter's] earnest endeavour," he said, "to exhibit the facts of each case . . . briefly and accurately; and to state such of the arguments of counsel, as, in his opinion, were required for a full and correct understanding of the important points of the case, and the decision of the Court." Lest the latter point be lost on "his brethren of the profession," Peters put the matter more plainly still: "It has not been within the scope of [my] purpose, to give, at large, all the reasoning and learning addressed by them to the Court."⁴⁰⁴ The decisions, of course, were to be presented faithfully as handed down by the Court. And what of the notes that had so distinguished Wheaton's *Reports*? Of them, Peters said precisely nothing, for the simple reason that his volumes were to contain only the most basic marginal notes, and no appendix notes whatsoever. In short, Peters' plan for his *Reports* resembled the man himself: brisk, practical and determined to avoid unremunerative detours into esoteric scholarship.

The preface did, however, contain two novelties. First, Peters advised his readers that, pursuant to the recently renewed and amended Reporter's Act, he had stipulated with his publisher that the price per volume should be five dollars.⁴⁰⁵ What measures had been taken to provide a greater margin of profit at the *Reports*' new, low price, he did not say. Second, Peters drew special attention to his plan for presenting the abstracts (or headnotes) of the Court's decisions: "The syllabus of each case, contains an abstract of all the matters ruled and adjudged by the Court, and, generally, in the language of the decision, with a reference to the page of the Report in which the particular point will be found."⁴⁰⁶ Clearly, the provision of page references could only be regarded as an advance over preceding volumes of the *Reports*. Yet, overall, no aspect of Peters' work was to prompt such bitter criticism as the content of his presumably straightforward abstracts.⁴⁰⁷

1824); and, in that instance, Wheaton had had the added incentive of great public demand for reports of the several major cases decided during the 1824 Term.

404. 26 U.S. (1 Pet.) iii (1828).

405. 26 U.S. (1 Pet.) at iv. In fact, the statute plainly did not compel that the price be five dollars. Peters himself accurately quoted its requirement that "the decisions of the court shall be sold to the public at large, at a price *not exceeding five dollars per volume*." *Id.* (emphasis added). Peters' successors apparently read the Act more carefully than he did: nearly 40 years later, Reporter John William Wallace still found it possible to charge four dollars per volume. C. FAIRMAN, *RECONSTRUCTION AND REUNION 1864-88*, at 79 (6 Devise History Pt. 1, 1971, *supra* note *).

406. 26 U.S. (1 Pet.) iii-iv (1828). At least in theory, then, Peters could claim parentage of the headnote reference system now so commonly employed in judicial reports.

407. See text at notes 409-11 *infra*.

Predictably, the first assessment of volume 1 of Peters *Reports* came from Joseph Story. Story's interest in the reporting of the Court's decisions had obviously not diminished with Wheaton's departure. Writing within ten days of publication, Story assured Peters that he had great reason "to be proud of" his initial effort. "[U]pon a general survey of the volume," he could not but commend Peters' "great qualities" as a Reporter. He had performed his task with "fidelity, promptitude, & success." In particular, Story regarded Peters' inclusion of internal page references in the abstracts a useful improvement. On the other hand, there were a number of defects requiring mention. The volume contained a few errors that should be noted in its successor. In future volumes, Peters would do well to allow himself additional time before printing, "not only to accommodate the Printer's Devils, who after all are so mean foes, & much given . . . to misrepresentation, but to have more leisure to examine the proofs and compare the materials." Even more seriously, Story regretted "that the text is so compact & small." He "suppose[d] this was unavoidable in order to bring the work into a moderate compass, so as to afford it at the price established by the Act of Congress" But, in this respect, he "greatly . . . preferred . . . the 12th of Wheaton."⁴⁰⁸

The first reviews of Peters' initial volume to appear in print displayed an even more profound ambivalence. Boston's *American Jurist and Law Magazine*, for example, thought that Peters had improved on Wheaton "in forbearing to insert at length instruments and documents . . . where short . . . extracts only were necessary." While the *Jurist* pronounced itself "far from being insensible to the extensive research and erudition of Mr. Wheaton," it believed that the profession generally "were hardly satisfied with the high price of his volumes, or with the materials used to swell their dimensions." But Wheaton's prolixity had now been traded for Peters' imprecision, especially in the case abstracts of which the new Reporter had been so proud. An abstract of the case, the review pointed out, should "present briefly and accurately . . . all the important principles which have been decided or discussed" in the course of the decision. Instead, Peters had "heap[ed] into his abstracts incidental observations, reflections, and reasonings of the court The mass of matter thus thrown together serves to bewilder, rather than to assist the reader," making it almost as difficult "to ascertain the points from the note, as

408. Joseph Story to Richard Peters, Jr. (June 26, 1828), Peters Papers, *supra* note 46. Even the new Reporter himself later admitted that his first volume had been published in "exceedingly small type," which became "a subject of general censure." Richard Peters, Jr., to John Bell (Jan. 20, 1834), Peters Papers, *supra* note 46 (emphasis deleted).

from the whole case.”⁴⁰⁹ After providing a few particularly garbled excerpts from the volume to illustrate its point, the *Jurist* concluded with pointers for improvement in Peters’ upcoming second attempt.⁴¹⁰

Alas, the *Jurist* found volume 2 of Peters’ *Reports* “liable to the same objections,” only more so. In fact, “the mode of reporting, adopted in these volumes, not only renders them very inconvenient to readers, but is also likely to diminish very seriously the value and influence of the decisions of the highest tribunal in the country” Having made due allowance for the arduous labors of reporting and, on that account, forgiven Peters’ “little imperfections,” the review passed on to those that it found “essential and glaring.” Again, its strongest strictures were reserved for the Reporter’s abstracts of cases, which it charged amounted to little more than extracting from each decision “a number of sentences or paragraphs, on what principle of selection it is difficult to say, and plac[ing] them at the head of the case.” In almost every instance, the ratio decidendi of the case seemed to escape Peters’ method: “After studying a page or two of fine type, [the reader’s] mind is in a painful state of uncertainty as to the points actually decided by the court, and can only be relieved by examining the body of the decision.” Consistently, the Reporter reproduced observations of the Justices out of context, creating the misimpression of general rather than specific applicability; or he failed to include anything in the abstract that would alert the reader to the point actually determined by the Court. In at least one instance, Peters had stated as the holding of a case a rule “directly the reverse of the opinion” handed down by Marshall. “Indeed there is scarcely a single abstract in the volume which states the points in the case definitely and tersely, and which is not open to serious objections.”⁴¹¹

Sadly for Peters, the *Jurist* was not alone in its low estimation of his powers of intellect. To some, his work became a benchmark of mediocrity. Writing to a friend concerning Wheeler’s *Abridgment of American Common Law Cases*, Thomas Day, the Connecticut Reporter, observed in 1833: “As to his digests of cases, he neither gives you the *principle* nor the *case*, but generally presents some excerpts, from which one or the other — or possibly both — may be *conjectured*. He reminds one strongly of Peters’ abstracts in his Re-

409. *Peters’s Reports*, 1 AM. JURIST & L. MAG. 177-79 (1829).

410. *Id.* at 180.

411. *Peters’s Reports*, 3 AM. JURIST & L. MAG. 101-03, 108-09 (1830). The case incorrectly summarized by Peters was *Boyce v. Anderson*, 27 U.S. (2 Pet.) 150 (1829).

ports."⁴¹² And, commenting thirty years later upon the resignation of one of Peters' successors, a Philadelphia legal newspaper noted with considerable heat that

the Reports of the Supreme Court of the United States have been for many years past — ever since the time, in fact, that Mr. Wheaton ceased to report them — eminently discreditable to our professional character, abroad, and a vexatious burden [in] every way to those among us who were obliged to read them, at home.⁴¹³

As if these troubles were not enough, Peters quickly discovered upon assuming the reportership that it could not easily be made to pay nearly so well as he had imagined. Ironically, the five dollar per volume limitation imposed by the Reporter's Act of 1827 as the result of the 1826 Carey & Lea proposal proved to be, as both Wheaton and Donaldson had foreseen, a financial straitjacket that defied easy escape. It appears extremely doubtful that the reduction in price mandated by the Act produced a surge in sales of the *Reports*, perhaps because the subject matter had a limited audience at any price; but, whether it did or not, the one fact startlingly clear is that the net effect did not improve the Reporter's bottom line. Under the initial Act procured by Wheaton, it appears that his income ranged between \$1500⁴¹⁴ and \$1800.⁴¹⁵ Peters, unlike Wheaton, arranged with his publishers to be paid a set price, in the amount of \$2.875 per copy, on the sales of his *Reports* (the better, presumably, to be compensated for increased sales at the volumes' cheaper price). At least through 1834, however, sales never exceeded 700 copies per volume, meaning that Peters' publishers never paid him more than \$2012.50 per annum. Of this sum, he paid out of his own pocket each year \$820 for printing and \$780 for paper, or \$1600. Thus, Peters' profits from the sale of the *Reports* (\$412), added to the salary paid him by the government (\$1000), amounted to an income that never exceeded \$1412 — less than Wheaton's income in his worst years!⁴¹⁶

Yet these figures tell only a part of Peters' plan to tap what he believed to be the hidden profit-generating potential of the reporter-

412. Thomas Day to Willard Phillips (Dec. 16, 1833), Phillips Papers, Massachusetts Historical Society, Boston [collection hereinafter cited as Phillips Papers] (emphasis in original).

413. Editorial, *A Duty and a Right — The Supreme Court of the Union*, Legal Intelligencer (Philadelphia), Feb. 12, 1864, at 52, col. 1.

414. In each of the years 1817, 1818 and 1826, Wheaton received \$1000 from the government and \$500 from his publisher. See text at notes 301-06, 331 & 339-41 *supra*.

415. In both 1819 and 1824, Wheaton received \$1000 from the government and \$800 from his publisher. *Id.*

416. All of the figures concerning Peters, Jr.'s, finances as Reporter are taken from his January 20, 1834 letter to John Bell, Chairman of the House Judiciary Committee. Peters Papers, *supra* note 46 [hereinafter cited as Peters' Letter A to Bell].

ship. The second, intermediate step in the plan involved publishing a six-volume "bare bones" edition of his predecessors' reports at more affordable prices, in expectation of adding to his regular purchasers those innumerable members of the profession previously unable even to contemplate owning a complete set of the Supreme Court's *Reports*.⁴¹⁷ The *pièce de résistance* of the entire program, however, became apparent only in 1834, when its foundation had been fully laid by Peters' other activities. In essence, it involved creating by law a vast new market for Peters' own *Reports* and his editions of his predecessors' *Reports*, in every public office in the United States.

The audacity of this last suggestion, made to the Chairman of the House of Representatives' Committee on the Judiciary in the midst of its consideration of a new Reporter's bill, can hardly be overstated. Congress had neglected to renew the 1827 Act in 1830; but it had continued to appropriate \$1000 annually for the Reporter, and Peters, in turn, had continued to treat himself as bound by the five dollar per volume limitation in the 1827 Act.⁴¹⁸ Now seemed the time to put the Reporter's relationship with the government on a different footing, more advantageous to both. By 1834, Peters' abbreviated editions of the *Reports* of Dallas, Cranch and Wheaton were all in print. The entire jurisprudence of the Supreme Court was now contained in those six volumes, plus the seven volumes of Peters' own *Reports*. This invaluable collection must be made accessible, urged Peters, "to every portion of our wide spread country" by dissemination to the county clerk "in every county of the several states and territories of the Union," to "each hall of legislation," to "the executive departments of the states and territories," to the libraries of the states and of every court, and to "each diplomatic agent of the Country abroad to be kept in his official Bureau." No doubt the states and territories would identify other needy recipients for additional volumes, and a further stock should be purchased and kept in reserve for future distribution by the national government. All in all, Peters calculated the demand for his various *Reports* to be 1250 sets. These, he would sell to the United States at a discount. And, in return for the guaranteed purchase of a similar number of his annual volumes in each succeeding year (and deletion of the required delivery of eighty free copies), Peters would gladly forgo the "present allowance" of \$1000 in any new Reporter's act.⁴¹⁹

417. See text at note 422 *infra* (discussion of Peters' *Condensed Reports*).

418. Peters' Letter A to Bell, *supra* note 416. In the meantime, Peters had been compelled to report annually almost twice as many cases as Wheaton, excepting only Wheaton's last year. *Id.*

419. Richard Peters, Jr., to John Bell (Jan. 20, 1834), Peters Papers, *supra* note 46 [hereinaf-

Grandiose? Yes. Far-sighted? That, too. Admittedly, the sales of 1250 copies to the government would have nearly tripled Peters' sales. But surely he spoke a truth plain to many friends of the Court in pointing out that the advantages of the plan proposed "are intimately connected with sound and accurate knowledge of the supreme law of the land, and therefore closely united with the interest and prosperity of every citizen of the Union."⁴²⁰ Congress, however, elected to do nothing, and Peters was forced to carry on under the old arrangement until 1842.⁴²¹

In short, two of the three major components of Peters' plan for enhancing the Reporter's income miscarried badly: his own reports from 1827 forward generated no more net income than had Wheaton's; and the government failed to embrace his scheme for trebling their circulation by distributing them to public offices throughout the Union. Happily for Peters, the remainder of his program — which the title of the work, *Condensed Reports of Cases in the Supreme Court of the United States, Containing the Whole Series of the Decisions of the Court From Its Organization to the Commencement of Peters's Reports at January Term 1827*,⁴²² aptly describes — possessed an instant and assured appeal. Both the need for such a publication and Peters' gift for identifying and exploiting that need shine with luminous clarity from the pages of his self-confident *Proposals* for the work, issued less than six months after assuming the Reporter's office:

The Supreme Court of the United States has been organized for thirty-eight years, and its decisions form in themselves almost an entire code of laws. Many of the difficult and important questions of constitutional construction, and of the nature and extent of the powers reserved, granted, and claimed, under the constitution, have passed under the careful observation and judgment of the court. . . .

. . . .

Considerations growing out of these circumstances, seem to impose the necessity that the law thus general, thus established, thus supreme, should be universally known. That there should be found but few copies of the reports of the cases decided in the Supreme Court of the United

ter cited as Peters' Letter B to Bell] (companion to Letter A of the same date, cited in note 416 *supra*).

420. *Id.*

421. Act of Aug. 26, 1842, ch. 202, § 2, 5 Stat. 524 (raising the Reporter's salary to \$1250, but requiring presentation of 150 copies to the government and publication within four months). By the Act of July 1, 1922, ch. 267, §§ 1, 2, 42 Stat. 816, the entire plan of publication was revised to provide for printing to be done at the Government Printing Office, with the sale of the *Reports* to the public to be accomplished by the Superintendent of Documents. The Reporter was divested of all interest in the *Reports*, and his salary was adjusted to reflect the new arrangements.

422. Published in six volumes between 1830 and 1834.

States in many large districts of our country, in which there are federal and State judicial tribunals, is asserted to be a frequent fact. In some of those districts, it is positively averred that not a single complete copy of all the reports is in the possession of any one, and thus the great and overruling law of the land is almost unknown in many populous parts of the Union. These things should not be.

It will not be denied that these circumstances are the consequences of the heavy expense which must be incurred by the purchase of the two [sic] volumes of the Reports of Mr. Dallas, the nine volumes of Mr. Cranch, and the twelve of Mr. Wheaton's Reports; together twenty-three [sic] volumes — the cost of which exceeds one hundred and thirty dollars.

It is proposed to publish all the cases adjudged in the Supreme Court of the United States from 1790 to 1827, inclusive, in a form which will make the work authority in all judicial tribunals, and to complete the publication in not more than six volumes, the price of which shall not exceed thirty-six dollars.⁴²³

Thirty-six dollars! There were trade-offs, to be sure. The type employed in the *Condensed Reports* was smaller than in the original volumes. The arguments of counsel that had appeared in the earlier reports were omitted entirely, as well as the appendix notes contained in Wheaton's twelve volumes. And, most significantly, Peters pared away concurring and dissenting opinions in his zeal to present the cases in "abbreviated form."⁴²⁴ On the other hand, Peters promised to add "a reference in each case to the parallel cases which have been decided by the court, and, in some instances, the reported and manuscript decisions upon the same questions, in the circuit courts of the

423. *Proposals For publishing, by subscription, The Cases Decided in the Supreme Court of the United States, From its organization to the close of January term, 1827 (1828)*, Record, *supra* note 68, at 9-11 [hereinafter cited as *Proposals*]. In revising his *Proposals* for inclusion as the preface to the first volume of the *Condensed Reports*, Peters correctly noted that the work would encompass three of Dallas' volumes (volumes 2, 3 and 4), making a total of *twenty-four* volumes contained in the *Condensed Reports*.

Owning a full set of the *Reports* of Dallas, Cranch, and Wheaton at \$130 was beyond the means of all but the most successful lawyers in major commercial centers. Comprehensive information concerning contemporary lawyers' income is difficult to obtain, but examples abound. Consider:

According to George W. Strong, his father, who practiced in upstate New York, earned \$217 during his first year at the bar (1826-27), but "in his third year of practice was evidently making good headway, for his receipts in 1829 amounted to \$670.00." Bartholomew F. Moore, who was admitted to the North Carolina bar in 1823, relates that his total income from the practice of law during his first seven years [*i.e.*, through 1830] amounted to only \$700, or about \$100 per year.

2 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 88 (1965) (quoting G. STRONG, *LANDMARKS OF A LAWYER'S LIFETIME* 11 (1910)).

In Boston, the bar followed a schedule of minimum fees, designed to eliminate cost competition between lawyers and place a floor under their incomes. An attorney received \$1.50 for a case in the Massachusetts Court of Common Pleas, \$2.50 for a Supreme Judicial Court case and \$.33 per day for attendance. 2 *THE PAPERS OF DANIEL WEBSTER* 119 n.3 (A. Konefsky & A. King eds. 1983) (citing *SUFFOLK COUNTY BAR BOOK, 1770-1805*, at 29-30 (1882)).

424. Record, *supra* note 68, at 16 (Peters' separate answer to Wheaton's bill in equity).

United States."⁴²⁵ Helpful as these aids might be, however, the central appeal of the proposed condensation remained simply this: by purchasing the *Condensed Reports*, the bar might soon obtain access to all the volumes of Peters' predecessors at a price reduced by nearly seventy-five percent.

Two sorts of reactions were readily predictable. Typical of the first sort were those of Story and Washington, men deeply interested in disseminating broadly the reports of the Supreme Court. Story thought the "compressed Edition" contemplated by Peters "a most valuable present to the Profession." The aggregate expense of the *Reports* of Dallas, Cranch and Wheaton had become prohibitive. "Either therefore few persons must be in possession of those Decisions, or a plan of publication like yours must be adopted."⁴²⁶ Washington, too, enthusiastically supported Peters' undertaking. "Your prospectus for the consolidated work," he wrote, "is excellent, and must take with the bar in every part of the United States. To them, it cannot fail to be a treasure, & I do not doubt but that the unusual patronage it will receive in the Western, as well as the Atlantic States, will liberally reward you"⁴²⁷

Inevitably, Peters' proposals for his *Condensed Reports* drew another sort of response as well. With the exception of A.J. Dallas,⁴²⁸ each of Peters' predecessors as Reporter vigorously protested his plans. The first missive to arrive was William Cranch's. Writing with "great reluctance" a month following publication of the *Proposals*, Cranch objected strongly to the publication of any "new edition" of his reports by Peters: "I have not yet been reimbursed the actual expense of publishing my 3 last volumes by one thousand dollars and

425. *Proposals*, *supra* note 423, at 10-11.

426. Joseph Story to Richard Peters, Jr. (June 26, 1828), *Peters Papers*, *supra* note 46.

427. Bushrod Washington to Richard Peters, Jr. (July 21, 1828), *Peters Papers*, *supra* note 46.

428. Dallas had died in 1817. This, in itself, would not have cut off claims by his heirs or assigns to copyright in the four volumes of his *Reports*, provided that any such interest still subsisted in 1828. This seems doubtful for a variety of technical reasons, including the difficulty of proving compliance by Dallas with the statutory formalities when each of the volumes was originally published. Moreover, under the Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124 (providing an initial term of 14 years and the possibility of a renewal term of the same duration), no work could remain in copyright under any circumstances for longer than 28 years. Dallas had issued his first three volumes in 1790, 1798 and 1799, so that clearly those works had fallen into the public domain prior to the publication of Peters' *Proposals* in 1828. The copyright in volume 4 might theoretically have been extended through 1835, had Dallas lived to effect the renewal in 1821. Even so, volume 4 of Dallas' *Reports* had contained only 45 pages of United States Supreme Court decisions, scarcely an interest sufficient to justify protracted litigation. Whatever the reasons, Peters received no communication from anyone purporting to hold an interest in Dallas' works.

. . . must insist upon all my legal rights."⁴²⁹ Upon due deliberation, Peters riposted that he had no objection to Cranch's insistence on his legal rights. For he had no desire to publish a new edition of any valuable matter added by Cranch to the decisions contained in his *Reports*. On the contrary, "My Work will be a 'Digest' of the facts of the Cases and the opinions of the Court — no more." Neither the facts nor the opinions, Peters asserted, could be the subject of copyright, and thus his proposed reports "will not be obnoxious to the law protecting literary property." Besides, Cranch had overlooked the bright side: "I have not adopted the opinion, that my Work will injure the sale of your or Mr. Wheaton's Reports." Rather, "they will be more in demand as their more valuable contents shall by my means be made more known. All Booksellers say 'Digests' promote the sale of the original Works."⁴³⁰

Wheaton, in faraway Denmark, first learned of Peters' plans from Donaldson, who informed him also that the proposals had put "almost an entire stop to the sales" of both the *Reports* and the *Digest of Decisions*. Wheaton's publisher, lacking a copyright interest of his own in all but the first volume of *Reports*, demanded that Wheaton immediately engage counsel to protect their mutual interests. Donaldson saw the larger importance of the situation as well, pointing out that "until an example is made of these literary Pirates there can be no security for the labours of authors and Publishers."⁴³¹

At first, Wheaton seems not to have appreciated fully the gravity of his peril. He responded to his publisher's entreaties in September with the suggestion that Donaldson or Wheaton's former law partner, Elijah Paine, journey to Philadelphia to confer with local counsel there. Considering his copyright legally sound, Wheaton assumed

429. William Cranch to Richard Peters, Jr. (July 18, 1828), Peters Papers, *supra* note 46.

430. Richard Peters, Jr., to William Cranch (Aug. 14, 1828), Peters Papers, *supra* note 46. Peters had actually anticipated his arguments to Cranch in the *Proposals* themselves. *Proposals*, *supra* note 423, at 11. His references to "Digests" both there and in this letter, however, seem oddly misplaced. In the *Proposals*, Peters described his *Condensed Reports* as equivalent to Wheaton's *Digest of Decisions*. *Proposals*, *supra* note 423, at 11. Yet Wheaton's work literally digested or summarized the holdings of the Court's decisions, whereas Peters intended to reproduce the actual decisions. Plainly, Wheaton's *Digest* had encouraged resort to the reports containing the decisions in full. In contrast, Peters' *Condensed Reports* would tend to eliminate any need to consult the original volumes: indeed, that was their purpose.

431. Robert Donaldson to Henry Wheaton (Aug. 11, 1828), Wheaton Papers, *supra* note 1. Donaldson complained directly to Peters that

the effect of [the *Condensed Reports*] would be to me literally ruinous on a large amount of property . . . Likewise the injury that would be done to my absent friend Henry Wheaton, Esq., by such a publication and the result of which would be to deprive him and his family of the pecuniary reward due to his professional labours of 12 years.

Robert Donaldson to Richard Peters, Jr. (Sept. 25, 1828), Peters Papers, *supra* note 46. Peters responded by sending Donaldson a copy of his reply to Cranch. Richard Peters, Jr., to Robert Donaldson (Sept. 26, 1828), Peters Papers, *supra* note 46.

that the mere threat of suit might be sufficient to deter Peters from carrying into effect his announced intentions.⁴³² By November of 1828, however, Wheaton felt it advisable that he himself write to Daniel Webster. Might not Webster speak directly with Peters, who undoubtedly had not "duly considered the injury" that his proposed publication would cause to Wheaton? Wheaton had counted on the second editions of his works in order to realize the fruits of his labor, but this expectation would be "entirely defeated" if Peters persisted in his designs. In that event, Wheaton would feel it his duty to protect his property by legal measures. In fact, he had already given "contingent instructions" if such action became necessary, "but not to be executed until amicable remonstrances have been first tried."⁴³³

Nothing, however, would budge Peters from his chosen path. Volume 1 of the *Condensed Reports* went to press late in 1829.⁴³⁴ Having just lost his principal patron, Bushrod Washington, to death,⁴³⁵ Peters wasted no time in shoring up his support on the Court against any eventuality. He promised to dispatch a copy of his newest work immediately when printed to Justice Story,⁴³⁶ and dedicated the work itself, "most respectfully and affectionately," to Chief Justice Marshall.⁴³⁷ Story responded at once upon receipt of volume 1, pronouncing himself "so much pleased" with the "plan & execution" of the work "that I shall take it with me to Washington for use during the

432. Henry Wheaton to Robert Donaldson (Sept. 30, 1828), Wheaton Papers, *supra* note 1.

433. Henry Wheaton to Daniel Webster (Nov. 25, 1828), Webster Papers, Library of Congress, Washington, D.C. Wheaton anticipated an annual income of \$2000 from future editions of his *Reports*. E. BAKER, *supra* note 130, at 130.

434. For convenience, the contents and publication dates of this and each succeeding volume of Peters' *Condensed Reports* are listed below:

Vol. 1 (1830): Vols. 2, 3 and 4 of Dallas' *Reports*;

Vols. 1, 2 and 3 of Cranch's *Reports*

Vol. 2 (1830): Vols. 4, 5, 6 and 7 of Cranch's *Reports*

Vol. 3 (1831): Vols. 8 and 9 of Cranch's *Reports*;

Vol. 1 of Wheaton's *Reports*

Vol. 4 (1833): Vols. 2, 3, 4 and 5 of Wheaton's *Reports*

Vol. 5 (1833): Vols. 6, 7, 8 and 9 of Wheaton's *Reports*

Vol. 6 (1834): Vols. 10, 11 and 12 of Wheaton's *Reports*

Although the title page of volume 1 indicates publication in 1830, the correspondence in notes 435 and 438-40 *infra* indicates that it had actually begun circulating among Peters' friends by December of 1829.

435. Justice Washington died in Philadelphia on November 26, 1829. Richard Peters, Jr., to Joseph Story (Nov. 26, 1829), Story Papers, Massachusetts Historical Society, Boston [hereinafter cited as Story Papers, Boston].

436. *Id.*

437. R. PETERS, JR., CONDENSED REPORTS OF CASES IN THE SUPREME COURT OF THE UNITED STATES, CONTAINING THE WHOLE SERIES OF THE DECISIONS OF THE COURT FROM ITS ORGANIZATION TO THE COMMENCEMENT OF PETERS'S REPORTS AT JANUARY TERM 1827 iii (1830).

next Session of the Supreme Court in lieu of the orig[ina]l Reports."⁴³⁸ Other members of the Court, to whom Peters had also provided complimentary copies, offered similar praise.⁴³⁹ And, a step lower in the federal judiciary, District Judge Joseph Hopkinson of Philadelphia, a member of the Circuit Court for the Eastern District of Pennsylvania that would later issue the key trial court ruling in *Wheaton v. Peters*, observed: "The importance of a general circulation of the decisions of the highest judicial tribunal of our country to the uniformity and correctness of the judgments of inferior courts renders a work like the present, almost one of necessity."⁴⁴⁰

In fact, Peters' *Condensed Reports* quickly became a roaring success. By February 8, 1831, when volume 3 appeared in an edition of 1500, fully 900 copies had been sold by subscription in advance.⁴⁴¹ Volume 3, besides containing the first volume of Wheaton's *Reports*, included Cranch's last two volumes. Any threat of suit by Cranch had vanished earlier, however, when Cranch, apparently seeing the handwriting on the wall, agreed to settle without litigation in return for fifty copies of the *Condensed Reports*.⁴⁴² Only the problem of Wheaton's claims remained.

Wheaton and his publisher refused to concede. In light of the extraordinary subscription achieved by Peters' third volume, they had no choice: the market for Wheaton's own *Reports* would soon be glutted. In New York, Donaldson immediately threatened a local bookseller with prosecution in the event of any sale by him of volume

438. Joseph Story to Richard Peters, Jr. (Dec. 10, 1829), Peters Papers, *supra* note 46. Indeed, Story's enthusiasm for the *Condensed Reports*, as for all projects likely to increase the circulation of the Court's decisions throughout the country, knew few bounds. He understood from the outset that Wheaton and Cranch had "scarcely reaped" the "fair reward" to which their labors entitled them; but, doubting that they ever would, he endorsed Peters' project anyway. Joseph Story to Richard Peters, Jr. (June 26, 1828), Peters Papers, *supra* note 46. He even approved Peters' "proposed course of dropping the dissentient opinions" from his condensation, graciously announcing that "[s]o far as I am personally concerned I have no desire that my own should reappear." Joseph Story to Richard Peters, Jr. (May 30, 1830), Peters Papers, *supra* note 46. Ultimately, the "great value" of the *Condensed Reports* to him was that they "bring with[in] the compass of the most moderate means all the important decisions of the Supreme Court." Joseph Story to Samuel E. Sewell (Sept. 13, 1830), Phillips Papers, *supra* note 412.

439. *E.g.*, Smith Thompson to Richard Peters, Jr. (Dec. 19, 1829), Peters Papers, *supra* note 46 ("a highly useful book").

440. Joseph Hopkinson to John Grigg (publisher of the *Condensed Reports*) (Dec. 1, 1829), Hopkinson Papers, Historical Society of Pennsylvania, Philadelphia.

441. F. HICKS, MEN AND BOOKS FAMOUS IN THE LAW 208 (1921). This subscription exceeded by 200 the number of copies of Peters' own reports regularly purchased by the public. *See* text at note 416 *supra*.

442. Richard S. Coxe to Richard Peters, Jr. (Dec. 11, 1829), Peters Papers, *supra* note 46 (stating Cranch's offer); Peters to Coxe (Dec. 13, 1829), Miscellaneous Papers, New York Historical Society, New York City (accepting offer).

3 of the *Condensed Reports*.⁴⁴³ Peters responded to this threat by providing to his own publisher, John Grigg of Philadelphia, a letter for distribution to the New York bookseller and to any others similarly concerned, promising to “indemnify and save harmless from all costs and damages all who publish or sell the work.” In addition to his claim previously asserted that the facts and opinions reproduced in his work were not subject to copyright at all, Peters now added the significant charge that in no instance had Wheaton complied with the statutory formalities of the federal copyright act. He refused, therefore, to be swayed by idle threats:

Nothing, sir, can stay the progress or the success of the *Condensed Reports*, as you know the greater part of the first edition has been disposed of, and you have proposed to me to put another to the press.

Congress, yesterday, by a joint resolution, . . . under circumstances particularly gratifying to me, authorized the purchase of seventy copies of the work. It is in constant use in the Supreme Court of the United States, by the bench and the bar. Every day new demands are made for it, and additional evidence received of its usefulness.

Peters closed with the pious observation that his *Condensed Reports* would “diffuse a knowledge” of the accomplishments of the federal judiciary throughout the nation, and thus “strengthen and secure” its foundations. “These,” he said, “will be my rewards for the labors of the publication, and their anticipation has been the chief inducement to undertake it.”⁴⁴⁴

In May of 1831, on behalf of Wheaton and himself, Donaldson filed in the Circuit Court for the Eastern District of Pennsylvania a bill in equity against Peters and Grigg, praying for an injunction to prevent the further printing, publication or sale of volume 3 of the *Condensed Reports* and an accounting of profits. The bill alleged that the said volume contained “without any material abbreviation or alteration, all the reports of cases” in volume 1 of Wheaton’s *Reports*.⁴⁴⁵ In his answer, Peters denied that he had violated the complainants’ rights, contending that the statutory requirements for securing a federal copyright had not been met, that no right to common law copyright existed in the United States and that, in any event, the contents of Wheaton’s *Reports*, insofar as they had been taken over into Peters’ *Condensed Reports*, were incapable of supporting a copyright either

443. E. BAKER, *supra* note 130, at 126.

444. Richard Peters, Jr., to John Grigg (Mar. 2, 1831), *reprinted in Record*, *supra* note 68, at 12-14.

445. *Record*, *supra* note 68, at 6-7.

under statute or at common law.⁴⁴⁶

For two years, the matter remained mired in the circuit court.⁴⁴⁷ Initially, the court issued the preliminary injunction sought by Wheaton and Donaldson. In early 1832, Peters and Grigg moved to dissolve the injunction. The two judges constituting the court — Henry Baldwin (who had succeeded Bushrod Washington on the Supreme Court) and Joseph Hopkinson (who had succeeded Peters' father on the circuit court) — found themselves unable to agree on a disposition. Hopkinson favored dissolving the injunction; Baldwin, dismissing the motion. Accordingly, the injunction remained in force. Circumstances had changed, however, by the time the action came before the court for final hearing in December of 1832. Baldwin, incapacitated by a "derangement of the mind" of progressive severity, could not or would not sit. Hopkinson, refusing to defer the hearing "for a day," proceeded with the arguments. His opinion, dismissing the bill and dissolving the injunction, was entered on January 9, 1833.⁴⁴⁸ In essence, Hopkinson agreed with Peters and Grigg that the complainants had failed to accomplish the prerequisites for statutory copyright under the laws of the United States and that any claim to common law copyright, state or federal, had been precluded by the pertinent enactments of Congress.⁴⁴⁹ The opinion did not address the issue of the copyrightability of the opinions and other matter taken by Peters from earlier reports. Wheaton and Donaldson immediately appealed to the Supreme Court.⁴⁵⁰

The significance of the resolution of the issues in *Wheaton v. Peters* to the law of intellectual property in the life of the new nation can scarcely be overstated. In seeking to engage Daniel Webster to argue the case on what all parties considered its certain review by the Supreme Court, Elijah Paine had observed: "This suit . . . will be more interesting than any reported case on copyrights, and I believe the future interest of all authors in this country will be greatly affected

446. *Id.* at 14-18. Grigg's separate answer contained substantially the same allegations. *Id.* at 18-21.

447. The following account relies primarily on Elijah Paine's report to Wheaton, dated January 16, 1833, on the progress of the litigation.

448. 29 F. Cas. 862 (C.C.E.D. Pa. 1832) (No. 17,486), also reproduced in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, app. at 725 (1834). In his opinion, Hopkinson invited an appeal by Wheaton and Donaldson: "I am conscious of the importance of the questions which have been discussed in this cause, to the parties and to the public; and it is a real satisfaction to me to know that my opinion may be, and I presume will be, reviewed by another tribunal." 33 U.S. (8 Pet.) at 742.

449. Act of May 31, 1790, ch. 15, 1 Stat. 124 and Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.

450. Record, *supra* note 68, at 61. Peters, for his part, proceeded with publication of the remaining three volumes of the *Condensed Reports*. Volume 6 appeared in January of 1834, two months prior to argument of the appeal in the Supreme Court.

by its decision.”⁴⁵¹ If anything, Paine’s letter undersold to Webster the importance of his proposed representation. In fact, there had been only *two* reported decisions on the law of copyright in the four decades since the founding of the national government in 1789. One, a state case,⁴⁵² had displayed a liberal attitude toward authorship by excusing certain prerequisites to statutory copyright as merely “directory,” while the other, a Third Circuit decision by Justice Washington,⁴⁵³ had held any departure from the strict requirements of the Acts of 1790 and 1802 fatal to the author’s rights. At issue were two competing interests of great moment to the new American nation. On the one hand, authors claimed the right to profit from the creations of their minds, both for the encouragement of their own work and for the advancement of a national literature. Among the best known authors of the period were several of the Justices themselves, most notably Marshall and Story. On the other hand, too generous an attitude toward authorship might result in the creation of literary monopolies, thereby defeating the legitimate interest of the public in wide dissemination of the fruits of authors’ labors at affordable prices. The resolution by the Supreme Court of the controversy in *Wheaton v. Peters* could not help but determine how the balance between these opposing considerations would be struck.

Wheaton decided to leave as little to chance as possible in the determination of his cause. Paine, who had taken charge of the matter during Wheaton’s absence in Copenhagen, urged in August of 1833 “the great importance of [his] being present” for argument of the case at the Court’s January 1834 Term. “Peters is on the spot,” wrote Paine, “& alas, the face of a party does often turn a doubtful balance held by human judges.”⁴⁵⁴ After a boisterous late-season passage of thirty-two days from Liverpool, Wheaton arrived in New York on November 26, 1833.⁴⁵⁵

From New York, Wheaton proceeded to Washington, where he arrived in mid-January looking, in the words of his opponent, Peters, “very mad.”⁴⁵⁶ Wheaton at once threw himself into preparing memo-

451. Elijah Paine to Daniel Webster (Dec. 6, 1831), Webster Papers, New Hampshire Historical Society, Concord, N.H., quoted in E. BAKER, *supra* note 130, at 347 n.5.

452. *Nichols v. Ruggles*, 3 Day 145, 158 (Conn. 1808) (publishing title of book in newspaper and delivering copy to Secretary of State “constitute no part of the essential requisites for securing the copyright”).

453. *Ewer v. Coxe*, 8 F. Cas. 917 (C.C.E.D. Pa. 1824) (No. 4584) (holding all statutory requirements under 1790 and 1802 Acts, by virtue of latter enactment, to be mandatory).

454. Elijah Paine to Henry Wheaton (Aug. 28, 1833), Wheaton Papers, *supra* note 1.

455. E. BAKER, *supra* note 130, at 127.

456. Richard Peters, Jr., to Thomas Sergeant (Jan. 15, 183[4]), Sergeant Papers, *supra* note 211.

randa for Webster's use in argument. Unquestionably, in Wheaton's view, "a Reporter is an *Author*"; and, as such, "his exclusive right to the Copy cannot be affected by the circumstance of his being appointed by the Court." The annual salary of \$1000, first secured in 1817, he pointed out to Webster, "was notoriously intended as an *additional* encouragement to induce Mr. W. to continue to act as Reporter." The true reward for his labors lay in the reasonable expectation of continuing purchases of the *Reports* themselves, which in turn rested on the promise of continuing protection of the Reporter's copyright under the laws of the United States. "Who would have undertaken the risk & expense of publishing an edition of 1000 to 1200 copies (for \$600) which might be encountered the next day by a piratical edition?" In establishing the office of Reporter, Congress had not decreed that its occupant should surrender the copyright to his *Reports* nor authorized others to republish them without charge. "Does any man believe that Mr. W. would have made such an absurd bargain with the Government had it been *expressed*? [A]nd can it be *implied* from any thing in the nature & history of the transaction?"⁴⁵⁷

Wheaton's central point — that the decisions of the Court as rendered by the Reporter had always been regarded as subject to copyright by him — was not without substantial foundation. In the period immediately preceding passage of the first Reporter's Act, scarcely anyone had questioned the wisdom of according to Wheaton and his predecessors, or indeed to the various state reporters, the exclusive right to multiply copies of their works. Certainly Justice Story, Wheaton's mentor and friend, had then harbored no doubts concerning the copyrightability of judicial reports. One of his earliest letters to Wheaton had requested the young New York lawyer's aid in locating a publisher for the reports of Story's First Circuit: "Do you know of any Bookseller at New York who would be willing to print the work? If any would be willing, on what terms would he *purchase the copy right & print*?"⁴⁵⁸ And again, in response to Wheaton's plea for assistance in finding a publisher for the first volume of his own *Reports*, Story had written: "I am fearful that at present there is not a bookseller in Boston who is able to print them, *or give anything for the copy right*."⁴⁵⁹ In his letters to members of Congress urging the creation of a salaried office of Reporter, Wheaton himself had consistently, and

457. Wheaton's Pre-Argument Memorandum A, *supra* note 342 (emphasis in original).

458. Joseph Story to Henry Wheaton (Oct. 16, 1813), Wheaton Papers, *supra* note 1 (emphasis added).

459. Joseph Story to Henry Wheaton (May 25, 1816), Wheaton Papers, *supra* note 1 (emphasis added).

without correction by his correspondents, assumed an exclusive right in that officer to publish and profit by his efforts.⁴⁶⁰ Even Chief Justice Marshall, in his letter to the Senate endorsing the Reporter's bill on behalf of the Court, had expressed the conviction that a salary would serve as a necessary addition to, not a substitute for, the income justifiably anticipated by the Reporter from the sales of his works.⁴⁶¹ In short, Wheaton's expectations regarding the copyrightability of his *Reports* had an entirely reasonable basis. The assumptions on which those expectations rested simply had not had occasion to be examined with a critical eye until challenged by Peters.

In recounting his expectations as Reporter, then, Wheaton could make an impressive case. He faltered slightly, however, in describing to Webster precisely *which* aspects of his works constituted copyrightable authorship. "Mr. W. is unquestionably author," he wrote, "of the Summaries of Points decided — of the Statements of the Cases prefixed — of the analytical Indexes at the end of each vol. All these Mr. P. has pirated." But what of the opinions themselves, the principal component of the *Condensed Reports'* commercial appeal? Wheaton noted that "there [were] in every volume several Opinions delivered *orally* from the Bench, & taken down by Mr. W." Yet, even assuming this to be true, the rationale for according such opinions copyright protection plainly would not extend to the Court's more significant opinions, prepared by the Justices themselves in manuscript, which constituted the great bulk of the *Reports*. To this objection, Wheaton suggested the following reply:

Supposing then Mr. W. has no Copy Right in the written opinions of the Judges — for argument's sake, — it is enough if he has such Right in any substantial portion of his 12 vols., which Mr. Peters has copied, no matter how little *mind* it may have required to compose that portion, or how piddling the labour may have been.⁴⁶²

In effect, Wheaton found himself reduced to arguing that the *Reports*, because they included parts individually susceptible to copyright, constituted compilations entitled to protection in their entirety.⁴⁶³

460. *E.g.*, Henry Wheaton to John Sergeant (Apr. 20, 1816), Sergeant Papers, *supra* note 211 (asserting that "the copy right alone will not indemnify me against the expense of time and money devoted to the object"). *But see* text at notes 332-33 *supra* (debates in Congress).

461. *See* text at note 338 *supra*. Even opponents of the bill, who argued that "the sale of the copyright would amply pay [the Reporter] for the trouble" of preparing the volumes, apparently assumed the Reporter's ownership of the copyright. *See* Henry Wheaton to Charles J. Ingersoll (Jan. 6, 1817), Ingersoll Papers, *supra* note 318.

462. Wheaton's Pre-Argument Memorandum A, *supra* note 342 (emphasis in original).

463. *Cf.* the Copyright Act of 1976, which specifically approves the copyrightability of compilations, but provides that "[t]he copyright in a compilation . . . extends only to the material

Similar difficulties confronted Wheaton in attempting to dispose of Peters' remaining objections to his claims. On the issue of his compliance with the statutory formalities imposed by the Copyright Acts of 1790 and 1802,⁴⁶⁴ Wheaton assured Webster that each and every requirement had been fulfilled. He failed, however, to note or suggest solutions to the case's chronic and potentially fatal evidentiary deficiencies concerning publication of the copyright claims in the public press.⁴⁶⁵ And he attempted feebly to explain away his own inattention to depositing a copy of each volume of the *Reports* with the Secretary of State, pursuant to the Copyright Acts, with the argument that he considered furnishing eighty copies, as required under the Reporter's Act, sufficient for both purposes.⁴⁶⁶ In sum, Wheaton had achieved substantial compliance with all of the statutory requirements; and, in those instances when his observance had been less than punctilious, the requirements were "directory merely" and "not a condition, the non-compliance with which forfeits the right."⁴⁶⁷

On the issue of a possible common law copyright subsisting apart from the right claimed under statute, Wheaton declined "to be drawn into the field of controversy whether the federal Courts have a common law jurisdiction, although it would be easy to show that they have." Instead, he considered it sufficient to "assume that the Acts of Congress were intended to secure my right of property existing independent of the Acts themselves." Being "remedial & protective" only, they should be given a "liberal construction." Thus, Wheaton considered himself entitled to an injunction to secure the enjoyment of "sacred rights," whose origin (apart from statute) he was unwilling or

contributed by the author of such a work [*i.e.*, by the compiler], as distinguished from the preexisting material employed in the [compilation] . . ." 17 U.S.C. § 103 (1982).

464. Taken together, the acts prescribed four steps to be taken by an author seeking to obtain a federal statutory copyright: (1) record the title of the work in the office of the clerk of the federal judicial district in which the author resided; (2) print a copy of the record thus procured on the title page, or following page, of the work; (3) within two months of recording the title, cause a copy of the record to appear in the public press for a period of four weeks; and (4) within six months of publication of the work itself, deliver a copy thereof for deposit at the Department of State. Specifically, Peters claimed that Wheaton had failed to perform the third and fourth steps.

465. See, e.g., *Elijah Paine to Henry Wheaton* (Jan. 16, 1833), *Wheaton Papers*, *supra* note 1.

466. Carey, as proprietor of the initial term of the copyright to Wheaton's first volume, had attended to compliance with the statutory formalities concerning that volume. Record at 23-24 (evidence of Henry C. Carey). With respect to succeeding volumes, Wheaton himself had exercised considerable care to assure proper delivery of the 80 copies required to obtain payment of his salary. Record, *supra* note 68, at 40-48 (deposition of Daniel Brent and certificates of receipt by Department of State). None of the available evidence, however, suggests that Wheaton ever sought to insure a separate deposit of one copy of each of his volumes (making a total of 81) for purposes of securing his copyrights.

467. Second of Wheaton's pre-argument memorandum to Webster (Jan., 1834) [hereinafter cited as *Wheaton's Pre-Argument Memorandum B*].

unable to describe.⁴⁶⁸

In the actual argument of the case on March 11, 12, 13 and 14, 1834 before Marshall, Story, Duvall, McLean, Thompson and Baldwin,⁴⁶⁹ the arguments propounded in Wheaton's memoranda metamorphosed significantly in the hands of Webster and Paine. Paine assumed, without really arguing, that proper notice of Wheaton's copyright claims had been given in the press, and asserted, without really proving, that in actuality eighty-one copies of the *Reports* (not simply the eighty copies required to obtain the Reporter's salary) had been transmitted annually to the Department of State.⁴⁷⁰ Wheaton was thus within the letter of the law, and most certainly within its spirit. The statutes at issue must not be construed, contrary to the Constitution, in such a way as to impair an author's right of property in copies of his work by loading down that right "with burthensome and needless regulations" making the preservation of the right "wholly dependent on accidental mistake or omission."⁴⁷¹ For the framers of the Constitution had "adopted it with a particular view to preserve the common law right to copyrights untouched."⁴⁷²

Unlike Wheaton, however, Paine located the origin of an author's "acknowledged pre-existing right" to profits derived from the multiplication of his work not in federal common law, but in the common law of Pennsylvania. Merely by adopting the Constitution, the states "ha[d] not surrendered to the Union their whole power over copyrights, but [had] retain[ed] a power concurrent with the power of congress."⁴⁷³ For any violation of his common law right, Paine declared, an author might obtain "the ordinary remedies by an action on the case and bill in equity,"⁴⁷⁴ either in state court or "in the circuit court of the United States . . . independently of the provisions of the act of congress."⁴⁷⁵ Thus, the federal copyright acts neither conferred the natural property right sued upon by Wheaton nor diminished in any way the ordinary remedies available to him to vindicate it. Instead, the Acts of 1790 and 1802 operated only to "secure" the author's

468. *Id.*

469. "Mr. Justice Johnson was absent, from indisposition, during the whole term." 33 U.S. (8 Pet.) iii (1834).

470. "The fact is, that eighty-one copies were sent, but the law giving the salary, not requiring more than eighty, the papers in the department under these acts speak of but eighty; and all being sent to the department together, is the reason why there was no minute, or memorandum, or certificate . . ." 33 U.S. (8 Pet.) at 612.

471. 33 U.S. (8 Pet.) at 605.

472. 33 U.S. (8 Pet.) at 601.

473. 33 U.S. (8 Pet.) at 597-98.

474. 33 U.S. (8 Pet.) at 607.

475. 33 U.S. (8 Pet.) at 606.

rights by adding to his remedies under state law the possibility of “penalties and forfeitures” to be enforced against infringing parties upon compliance by the author with the statutory formalities.⁴⁷⁶ Wheaton had sought no such penalty or forfeiture. Hence, any non-compliance with the Acts, even if conceded, could hardly deprive him of his right to obtain justice in the federal courts.

Paine reserved his greatest ingenuity, however, for the coda to his arguments. Of the four supposed objects of Peters’ piracy,⁴⁷⁷ only one really mattered: unless Wheaton had somehow obtained copyrights in the manuscript opinions of the Justices in every significant decision handed down during his tenure as Reporter, the *Condensed Reports* had infringed no interest of any real value in the marketplace. Paine thought the matter transcendentally clear. Wheaton had acquired a copyrightable interest in all such opinions, he averred, “by judges’ gift”:⁴⁷⁸

Were not the opinions of the judges their own to give away? Are opinions matter of record, as is pretended? Was such a thing ever heard of? They cannot be matters of record, in the usual sense of the term. Record is a word of determinate signification; and there is no law or custom to put opinions upon record, in the proper sense of that term. Nor were they ever put on record in this case. . . . The copy[*right*] in the opinions, as they were new, original and unpublished, must have belonged to some one. If to the judges, they gave it to Mr. Wheaton. That

476. 33 U.S. (8 Pet.) at 609.

477. “[F]irst, . . . the abstracts made by Mr. Wheaton; secondly, . . . the statements of the cases . . . ; thirdly, . . . points and authorities, and, in some instances, the arguments, and in all cases oral opinions . . . ; [and] fourthly, . . . the whole of the [written] opinions” prepared by the Justices. 33 U.S. (8 Pet.) at 617.

478. 33 U.S. (8 Pet.) at 614. Peters seems to have anticipated, and in some measure feared, this argument. Writing to Justice McLean in early 1830, he observed that the *Condensed Reports* had excited among booksellers holding unsold copies of his predecessors’ volumes “no small degree of hostility,” which he apprehended might lead to “an attempt to *injure*” his own *Reports*. Therefore, Peters wrote, “as I am under some doubt whether by the mere circumstance of my being Reporter I obtain a *property in the opinions* of the Court I have thought it a measure of prudence to obtain from each member of the Court a special assignment [of] the right to each opinion delivered by him.” Richard Peters, Jr., to John McLean (May 24, 1830), Miscellaneous Papers, New York State Library, Albany, New York (emphasis in original). McLean, author of the Court’s opinion in *Wheaton v. Peters* four years later, responded with notable care: “A faithful report of the decisions of the Supreme Court of the United States, is of great importance to the public, & I should exceedingly regret, any interference with your rights as Reporter. *So far as I have any right in the opinions delivered by me*, at the late session of the Court, I hereby, freely and fully, transfer it to you.” John McLean to Richard Peters, Jr. (June 3, 1830), Peters Papers, *supra* note 46 (emphasis added). Other members of the Court exercised similar caution. *E.g.*, Joseph Story to Richard Peters, Jr. (June 1, 1830), Peters Papers, *supra* note 46 (assigning the copyright in his opinions “in as ample a manner as I now hold the same,” while reserving the right of Congress to authorize future publications by others); and Henry Baldwin to Richard Peters, Jr. (June 8, 1830), Peters Papers, *supra* note 46 (same). The prickly William Johnson, however, rejected Peters’ request *in toto*, on grounds that “our opinions I have never doubted were public property & not assignable by us.” William Johnson to Richard Peters, Jr. (June 5, 1830), Peters Papers, *supra* note 46.

it did belong to them is evident; because they are bound by no law or custom to write out such elaborate opinions. They would have discharged their duty by delivering oral opinions. What right, then, can the public claim to the manuscript? The reporter's duty is to write or take down the opinions. If the court choose to aid him by giving him theirs, can anyone complain?⁴⁷⁹

All this, the Court had known in appointing Wheaton its Reporter and furnishing him the Justices' opinions. Reporters had always been assumed to acquire copyrightable interests in this, the single most valuable component of their works. To rule otherwise now would be to deprive not only Wheaton, but all other reporters as well, of their familiar rights.⁴⁸⁰ Such a result, as Paine clearly foresaw, would alter fundamentally the entrepreneurial underpinnings of court reporting throughout the country.

J.R. Ingersoll and Thomas Sergeant, on behalf of Peters, contradicted Paine's argument on every point. Each recognized, however, that Wheaton's case would stand or fall according to the Court's disposition of Paine's claim that the opinions of the Justices constituted copyrightable matter, the rights to which they had transferred to the Reporter. Said Sergeant:

The court appointed [Wheaton] under the authority of a law of the United States, and furnished him the materials for the volumes; not for his own sake, but for the benefit and use of the public: not for his own exclusive property, but for the free and unrestrained use of the citizens of the United States.⁴⁸¹

Ingersoll put the matter on an even higher plane, according equal dignity and an equal necessity of diffusion to enactments of Congress and decisions of the Court:

Reports are the means by which judicial determinations are disseminated, or rather they constitute the very dissemination itself. . . . The matter which they disseminate is, without a figure, the *law of the land*. Not indeed the actual productions of the legislature. Those are the rules which govern the action of the citizen. But they are constantly in want of interpretation, and that is afforded by the judge. He is the "*lex loquens*." His explanations of what is written are often more important than the mere naked written law itself. His expressions of the *customary law*, of that which finds no place upon the statute book, and is correctly known only through the medium of reports, are indispensable to the

479. 33 U.S. (8 Pet.) at 615. By an order adopted on March 14, 1834, however, the Court did provide that, upon publication of each volume of the *Reports*, the originals of such written opinions as had been prepared should be filed by the Reporter with the Clerk. 33 U.S. (8 Pet.) vii (1834), published in 42 U.S. (1 How.) xxxv (1843) as Rule No. 41. By a subsequent order, the Court required that opinions be first delivered to the Clerk for recording and then sent to the Reporter. 42 U.S. (1 How.) xxxv (1843) (Rule No. 42).

480. 33 U.S. (8 Pet.) at 616-17.

481. 33 U.S. (8 Pet.) at 638.

proper regulation of conduct in many of the most important transactions of civilized life. Accordingly, in all countries that are subject to the sovereignty of the laws, it is held that their promulgation is as essential as their existence. . . . It is therefore the true policy, influenced by the essential spirit of the government, that laws of every description should be universally diffused. To fetter or restrain their dissemination, must be to counteract this policy. To limit, or even to regulate it, would, in fact, produce the same effect. Nothing can be done, consistently with our free institutions, except to encourage and promote it.⁴⁸²

Webster's speech to the Court, concluding the arguments, briefly rehearsed the doctrinal points discussed by other counsel but sought primarily to reduce the case to its essential human dimension. There had come a point late in the reportership of Wheaton's predecessor, Webster said, when the very continuance of the *Reports* had hung in the balance. But for Wheaton's appearance on the scene, with the promise of "a regular annual publication of the decisions" of the Court, there might have been no dissemination whatsoever of future reports. In order to supplement his income for the copyright to his *Reports*, "[i]t was found necessary that there should be some patronage from the legislature," *i.e.*, a salary for the Reporter. Wheaton had "applied to congress, personally solicited its aid, and made a case which prevailed." The Reporter's Act had been regularly renewed, and thus "[t]he successor of Mr. Wheaton has had the full benefit of the grant obtained by the personal exertions of Mr. Wheaton." Lately, although "well advised" of Wheaton's rights, Peters had "materially injured" those interests by publication of the *Condensed Reports*. In short, he had made "an indefensible use of [his predecessor's] labours," which the Court must now remedy by construing Wheaton's rights "liberally."⁴⁸³

The reluctance of the Court in deciding so bitter a controversy between two of its own officers, past and present, with each of whom the Justices had lived and worked on intimate terms, can readily be imagined. And that discomfort is reflected vividly in a series of extraordinary occurrences preceding and accompanying the announcement of the decision itself.

On the morning of March 18, 1834, as Wheaton prepared to leave his lodging for the Capitol, he encountered a messenger sent by Justice Story to both Wheaton and Peters with identical messages.⁴⁸⁴ Acting, in what the messenger assured Wheaton were the Justice's own words,

482. 33 U.S. (8 Pet.) at 619-20 (emphasis in original).

483. 33 U.S. (8 Pet.) at 651-52.

484. Wheaton's Post-Argument Memorandum (Mar. 18, 1834), Wheaton Papers, *supra* note 1 [hereinafter cited as Wheaton's Post-Argument Memorandum]. Story's messenger appears to have been Charles Sumner of Boston, the Reporter of Story's First Circuit decisions in three

“entirely on his own hook,” Story summoned the Court’s past and present Reporters to meet with him personally, in succession, in his chambers.⁴⁸⁵ Upon arriving as bid at half past ten, Wheaton was greeted by Story “in his usual cordial manner” and handed a memorandum which Story had been “authorized by the Court to communicate to” each of the litigants.⁴⁸⁶ The memorandum, which Story furnished also to Peters, advised the parties that the decision of the Court, if handed down, would unanimously hold that no right of property did or could exist in the Court’s opinions, and that the Justices were without power to confer upon its Reporters any copyright thereto. As to the marginal notes and indices prepared by Wheaton, however, the Court had touched upon but not finally determined the litigants’ rights. “Under the circumstances,” the memorandum concluded, “the Court (except Mr. Justice Baldwin, who declines any expression of his views as to the suggestion) thinks, that it is a fit subject for honourable compromise between the parties, by a reference to Gentlemen of the Bar or otherwise as a matter of equity & honour.”⁴⁸⁷

Wheaton’s initial reaction was both flustered and angry. Three weeks earlier, he advised Story, he had himself suggested to Peters, through Webster, that “the whole Cause” be referred to arbitrators. That offer had been rejected. At this late date, there would be insufficient time to secure agreement from Donaldson in New York to any compromise taking into account the Court’s views concerning the noncopyrightability of its opinions. Moreover, Wheaton confessed to Story in humiliation, the inconvenience and expense of concluding the litigation at a later date, if the need arose, would be insupportable: he had largely exhausted his assets and paternal inheritance already. Story seemed unmoved, and in fact suggested “in a menacing tone” that Wheaton might be operating under a supposition regarding the remaining issues in the case “that my rights were more extensive than they might turn out to be.”⁴⁸⁸ Wheaton then asked for and received leave to confer with Webster, who “unhesitatingly advised” him to reject the suggested compromise. Wheaton’s formal reply to the

volumes between 1830 and 1839. Wheaton refers only to “Mr. Sumner, a young gentlemen who had been employed by Mr. Peters in taking notes for him on the argument of the Cause.”

485. Wheaton’s Post-Argument Memorandum, *supra* note 484; Joseph Story to Henry Wheaton (Mar. 17, 1834), Wheaton Papers, *supra* note 1.

486. Wheaton’s Post-Argument Memorandum, *supra* note 484. Apparently, Story’s particular contribution to the Court’s design to force a resolution of the controversy short of final decision was his plan to broker the compromise personally in meetings with the parties.

487. Wheaton’s Post-Argument Memorandum, *supra* note 484; Story’s Post-Argument Memorandum (undated copy furnished by Story to Wheaton with letter of Mar. 25, 1834), Wheaton Papers, *supra* note 1.

488. Wheaton’s Post-Argument Memorandum, *supra* note 484.

Court, while restrained in tone, firmly reiterated the points made to Story and insisted that "the merits of the Cause so fully & ably discussed" be now finally resolved.⁴⁸⁹ Left with no choice, the Court proceeded to do as Wheaton had demanded at its conference later in the same day.

The necessity of resolving the difficult and highly charged issues presented by the case seems to have brought to a head many stresses already present in the Court. The death of Bushrod Washington five years before, as Peters then observed to Story, had destroyed "[t]he triple column [Marshall, Story and Washington] on which the Court ha[d] rested for many years in balance."⁴⁹⁰ In the years following, several members of the Court had fallen seriously and repeatedly ill.⁴⁹¹ By 1830, the Justices' traditional practice of keeping joint lodgings had broken down;⁴⁹² and, by 1832, Story had begun to lament privately a decline in the "dignity, character, & courtesy" of the Court.⁴⁹³ In the White House sat a President generally considered hostile to many of the doctrines theretofore promulgated by the Court and eager to install new men in the old Justices' places.⁴⁹⁴ And, by the 1834 Term, the Court could in some instances no longer muster the votes necessary to decide even major constitutional cases.⁴⁹⁵

489. Wheaton's Post-Argument Memorandum, *supra* note 484; Wheaton's letter to the Court (Mar. 18, 1834), Wheaton Papers, *supra* note 1. Wheaton's reply also specifically noted his claims, which he supposed the Court had "omitted by accident to mention," to his abstracts and statements of the facts and cases.

490. Richard Peters, Jr., to Joseph Story (Nov. 26, 1829), Story Papers, Boston, *supra* note 435.

491. Marshall's periodic bouts of infirmity are well known. *E.g.*, Richard Peters, Jr., to Joseph Story (Sept. 29, 1831), Story Papers, Boston, *supra* note 435 (Chief Justice, "exceedingly emaciated," in Philadelphia to see Dr. Physick, but illness "is said to be fatal"); and Richard Peters, Jr., to Joseph Story (Dec. 5, 1831), Story Papers, Boston, *supra* note 435 (Marshall "a well man!"). Johnson, suffering from "severe and continued indisposition," was unable to sit at all during the 1832 and 1834 Terms. 31 U.S. (6 Pet.) iii (1832); 33 U.S. (8 Pet.) iii (1834). Baldwin's supposed insanity proved a constant source of difficulty to his colleagues: he failed to attend the Court's 1833 Term in its entirety and missed a portion of the 1834 Term as well. 32 U.S. (7 Pet.) iii (1833).

492. White, *supra* note 187, at 45 (noting that, after 1829, "Justices McLean and Johnson did not take meals or sleep in the Court's quarters"). Somewhat later, in preparing for the 1833 Term, Story wrote to Peters that he would depend on Peters and Marshall to procure him lodgings in Washington. "I wish to go where ever the Ch. Justice goes. So I suppose will Judge Thompson & Judge Duvall. As to the rest, it is not worth while to make any arrangements for them, as the affair would be wholly uncertain *on their side*." Joseph Story to Richard Peters, Jr. (Nov. 13, 1833), Peters Papers, *supra* note 46 (emphasis in original).

493. Joseph Story to Richard Peters, Jr. (Mar. 31, 1832), Peters Papers, *supra* note 46.

494. *See, e.g.*, H. CARSON, *supra* note 12, at 283-84; 2 C. WARREN, *supra* note 12, at 1-5. Interestingly, President Jackson's first two appointees, McLean and Baldwin, split in *Wheaton v. Peters*, McLean writing for the majority (with Marshall, Story and Duvall, holdovers from the Court's "glory days") and Baldwin dissenting (along with Thompson, a Monroe appointee).

495. In the consolidated cases of *Briscoe v. Commonwealth Bank* and *Mayor of New York v. Miln*, Marshall announced the practice of the Court "not (except in cases of absolute necessity)

The atmosphere at the Justices' conference was no doubt made more painful by the reopening of old wounds inflicted in prior discussions of the case at hand. In recounting the conference to Wheaton on the day following the Court's announcement of its decision,⁴⁹⁶ Baldwin recalled that Story had accused him, at an earlier date, "of having granted an Injunction [on circuit] to prevent the publication of the Decisions of the Court."⁴⁹⁷ Perhaps to reduce the likelihood of such exchanges recurring, the conference decided without discussion (and adversely to the complainants) the question of Wheaton's supposed copyright under federal or state common law. On the statutory issues (also decided against Wheaton and Donaldson), discussion was allowed but kept so brief that the Justices left the conference table unclear, as they would discover the next morning, on whether there had been a majority for holding the notice and delivery provisions of the copyright law mandatory under the Act of 1802. Finally, while all of the conferees departed with an understanding that the matter must be remanded to the circuit court for further evidentiary proceedings, the majority was unwilling or unable to instruct Baldwin, who, with Hopkinson, would have to preside over the trial, concerning matters of law certain to arise there.⁴⁹⁸

Confusion at the conference presaged disaster on the day of decision. Just how deeply the matter had divided the Court became startlingly clear on the morning of March 19, 1834, when the Justices convened to announce their opinions.⁴⁹⁹ Story, the member of the Court previously closest to the two main litigants, missed the melee altogether. He had departed Washington on the 8 a.m. stage, leaving Justice McLean, in Wheaton's words, "to fire off the blunderbuss he

to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in opinion, thus making the decision that of a majority of the whole court," and the necessity of putting over *Briscoe* and *Miln* in the absence of Johnson and Duvall from the bench. 33 U.S. (8 Pet.) 118, 122 (1834).

496. All information in this paragraph, unless otherwise stated, is taken from Wheaton's Post-Decision Memorandum (Mar. 20, 1834, the day after the decision), Wheaton Papers, *supra* note 1.

497. Story's attitude toward the case may be further conjectured from his remark to Peters that he had been "surpri[s]ed at the appeal." Joseph Story to Richard Peters, Jr. (Nov. 13, 1833), Peters Papers, *supra* note 46.

498. In particular, Baldwin sought direction regarding how to instruct the jury as to the effect of lapse of time on Wheaton's assertions of actual, albeit unprovable, compliance with the statutory formalities.

499. All information in the next three paragraphs, unless otherwise stated, is taken from Charles Sumner's account to Story, written in the courtroom itself on March 19, 1834, immediately after the incidents he describes. Story Papers, Washington, D.C., *supra* note 372. Sumner also wrote a supplementary letter to Story on the same subject, dated March 20, 1834. See notes 506-13 *infra* and accompanying text.

had loaded, but had not courage to discharge.”⁵⁰⁰ The unfortunate McLean, on behalf of himself, Marshall, Story and Duvall, began by reading the opinion of the Court.⁵⁰¹ Wheaton appeared “strongly excited during its reading,” while Peters was “anxious but perfectly calm.” Immediately upon McLean’s conclusion, Thompson stated that he differed from the majority and that he considered the case “one of the most important ever decided.” Thompson then delivered the “purport” of his own opinion,⁵⁰² which he had not yet written out but which adopted the main points of Paine and Webster’s argument, “with much feeling.” In addition, Thompson asserted that “the Ct. were *equally* divided, so far as the operation of the St[atute] of 1802 went.”⁵⁰³ Baldwin followed,⁵⁰⁴ agreeing with Thompson and also dissenting “from another point of the opinion of the Ct. — viz. that the U. States *qua* U.S. had no common law” under which Wheaton might claim copyright.

McLean then attempted an explanation of the Court’s holding on the statutory issues, claiming that his analysis “was based on the St[atute] of 1790”⁵⁰⁵ and that the matter “was all clearly stated in the opinion he had read.” Thompson, “with intemperate warmth,” replied that “if [the analysis] had been clearly stated there w[ou]ld have been no need for explanation.” At this juncture, Marshall “made a statement of the opinion of the Ct. on the debated point [*i.e.*, statutory construction] which was listened to with gr[ea]t attention.” McLean, “with mingled pride & feeling checked by the proprieties of the

500. Henry Wheaton to Catherine Wheaton (Mar. 21, 1834), Wheaton Papers, *supra* note 1.

501. 33 U.S. (8 Pet.) at 654-68. The scene that followed no doubt owed its origin in part to the Court’s failure during this period to circulate opinions among the Justices prior to reading them in the courtroom. See White, *supra* note 187, at 30-33, for a description of contemporary practices in this regard. The problem may have been compounded by the breathtaking speed with which the Court routinely handed down its decisions. *Id.*

502. 33 U.S. (8 Pet.) at 668-98.

503. Charles Sumner to Joseph Story (Mar. 19, 1834), Story Papers, Washington, *supra* note 372 (emphasis in original). In William Johnson’s absence from the bench (see note 491 *supra*), there were only six members of the Court sitting. Thompson did not disclose which majority Justice he believed disagreed with McLean on the point at issue. In any event, an equally divided vote would have resulted in affirming Hopkinson’s decision that the 1802 Act made the performance of all four of the statutory requirements mandatory.

504. 33 U.S. (8 Pet.) at 698-98bb (F. Brightly ed. 1884). Baldwin apparently delivered a copy of his lengthy dissent to Peters too late for inclusion in the first edition of the *Reports* for the 1834 Term, thereby necessitating the unusual pagination of the opinion in later editions. The three opinions in the case are discussed at length, with helpful background concerning the doctrinal development of copyright law in America, in chapters 9 and 10 of L. PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968).

505. Charles Sumner to Joseph Story (Mar. 19, 1834), Story Papers, Washington, D.C., *supra* note 372.

place,"⁵⁰⁶ at once "read the very words of the opinion & added that *this dialogue across from one to another* was very unpleasant."⁵⁰⁷ Thompson rejoined "in a perfect boil,"⁵⁰⁸ while Baldwin, "by looks & motions & whispers" evidenced a "strong passion at his back."⁵⁰⁹ The Chief Justice "then s[ai]d that unless he had thought that the opinion as read needed explanation, he sh[ou]ld not have made it." Looking "like the good man whom Virgil has described as able to still the tumult of a crowd, by his very appearance,"⁵¹⁰ Marshall then "stated in full" the holding of the majority on the point of statutory construction. Through it all, Duvall sat "in utter unconsciousness of the strife around him," thereby "add[ing] to the grotesqueness of the scene," while "a large number of the bar" looked on "in anxiety & grief."⁵¹¹

At length, calm prevailed, and the Justices concluded their business for the Term. Word of the unusual "altercation" in court quickly spread to "*all Congress*," where it was "magnified . . . ten times over."⁵¹² The profession at large, however, was not to be similarly titillated. Before quitting Washington late the same afternoon, Marshall admonished Peters that he "did not wish [him] to make any mention of the *differences* in his report of the case."⁵¹³ Not surprisingly, the *Reports* when published remained silent concerning the colorful events of the day. Initial newspaper accounts of the decision likewise confined themselves to sober summaries of the doctrine of the case, venturing no comment beyond the observation that the Court had "rul[ed] every point of law . . . in favor of the appellee, Mr. Peters."⁵¹⁴

In technical terms, Peters had not won quite the sweeping victory suggested by the press. McLean's opinion left open the possibility that a tiny, unspecified portion of the matter claimed by Wheaton as author — in addition to the opinions of the Justices, the bill in equity had asserted copyrights in "the statements of the cases . . . and the abstracts thereof"⁵¹⁵ — might indeed have been infringed by Peters. Ac-

506. Charles Sumner to Joseph Story (Mar. 20, 1834), Story Papers, Washington, D.C., *supra* note 372.

507. Charles Sumner to Joseph Story (Mar. 19, 1834), Story Papers, Washington, D.C., *supra* note 372 (emphasis in original).

508. Charles Sumner to Joseph Story (Mar. 20, 1834), Story Papers, Washington, D.C., *supra* note 372.

509. *Id.*

510. *Id.*

511. *Id.*

512. *Id.* (emphasis in original).

513. *Id.* (emphasis in original).

514. U.S. Telegraph, Mar. 19, 1834.

515. Record, *supra* note 68, at 8. In his dissent, Justice Baldwin carefully noted that, in the

cordingly, the mandate of the Court in fact reversed and remanded the judgment and decree of the Third Circuit for a trial by jury to determine if Wheaton had published proper newspaper notice of his claim and delivered the requisite copy of the work to the Secretary of State for each volume of his *Reports*.⁵¹⁶ The parties regarded this disposition as a matter of considerable consequence. Peters sought vigorously, but unsuccessfully, to have the mandate amended and thereby avoid the inconvenience of a trial of the remaining factual questions, however trivial.⁵¹⁷ Wheaton returned to Denmark in June,⁵¹⁸ but not before setting in progress through his Philadelphia attorneys the necessary work of gathering the evidence to be adduced at trial.⁵¹⁹ In the event, the jury returned a verdict in Wheaton's favor in 1838,⁵²⁰ but the matter then dragged on interminably on its way back to the Supreme Court.⁵²¹ Before the appeal could be heard there, both of the principal parties had died: Wheaton, on March 11, 1848, and Peters, less than two months later, on May 2, 1848. Ultimately, their estates settled the litigation for a mere \$400 in 1850.⁵²²

For all practical purposes, however, the controversy had come to an end on March 19, 1834, when McLean announced in the concluding paragraph of his opinion:

It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.⁵²³

proceedings on remand, Wheaton might still prove his rights to literary property in "the marginal notes, or syllabus of the cases and points decided, the abstract of the record and evidence, and the index to the several volumes." 33 U.S. (8 Pet.) at 698g (F. Brightly ed. 1883).

516. 33 U.S. (8 Pet.) at 698bb-99 (F. Brightly ed. 1883).

517. See, e.g., John Marshall to Richard Peters, Jr. (May 15, 1834), Peters Papers, *supra* note 46 (one of several letters by various members of the Court rejecting Peters' argument that the mandate did not accurately reflect McLean's opinion).

518. E. BAKER, *supra* note 130, at 132-33.

519. See, e.g., Charles Chauncey to Henry Wheaton (Apr. 11, 1834), Wheaton Papers, *supra* note 1; John Cadwalader to Henry Wheaton (Apr. 24, 1834), Wheaton Papers, *supra* note 1; Charles Chauncey to Henry Wheaton (Apr. 29, 1834), Wheaton Papers, *supra* note 1; John Cadwalader to Henry Wheaton (June 10, 1834), Wheaton Papers, *supra* note 1.

520. John Cadwalader to Henry Wheaton (May 23, 1838), Wheaton Papers, *supra* note 1 (verdict advisory only, however, to equity court).

521. The appeal in the case was finally perfected in 1846. John Cadwalader to William Lawrence (Wheaton's friend, and later executor) (Sept. 24, 1846), Cadwalader Papers, Historical Society of Pennsylvania, Philadelphia [collection hereinafter cited as Cadwalader Papers].

522. William Lawrence to Robert Wheaton (Henry's son) (Feb. 18, 1850), Wheaton Papers, *supra* note 1.

523. 33 U.S. (8 Pet.) at 668. The larger principle vindicated by this holding, at least as it has subsequently been read, is that no work prepared by a public official in the performance of his or her public duties is subject to copyright. The Copyright Act of 1976 codifies *Wheaton v. Peters* with respect to all U.S. government works. 17 U.S.C. § 105 (1982). The same principle has been applied quite generally to works created by state officials in the course of their duties. See, e.g.,

In those few words, the Court destroyed much more than Wheaton's hope of leaving to his descendants a modest inheritance. It destroyed as well a presumption of ownership, long shared by Wheaton, his predecessors and the Justices themselves, which if given the force of law would have bestowed upon the Reporters of the Supreme Court exclusive title to those classic expressions of American law that constitute the Court's essential legacy to the nation.⁵²⁴ The decision thus stands as an indispensable prerequisite to the emergence of a truly national Supreme Court. No doubt, Wheaton and Peters saw the matter in more narrow and immediate terms. But their contribution to the development of a national jurisprudence, and the advancement of the Court they both served, is no less for that.

CONCLUSION

In the century and a half that have passed since its decision, the fame of *Wheaton v. Peters* has rested largely on its contribution to the law of intellectual property. Certainly, the primacy of the case in that sphere is well deserved, and not only because of its status as the Court's first pronouncement on the subject of copyright. For, while much of the decision's specific doctrine was long ago rendered obsolete by successive statutory revisions,⁵²⁵ the philosophy and direction which *Wheaton v. Peters* imparted to the American law of copyright endures. The basic premise of the Court's opinion — that copyright is

Georgia v. Harrison Co., 548 F. Supp. 110 (N.D. Ga. 1982), *vacated by agreement between the parties*, 559 F. Supp. 37 (N.D. Ga. 1983) (all state statutes and judicial opinions are in the public domain). The case law emphasizes the public's ownership of government works by virtue of having employed the officials who created them, as well as the practical need for free access by citizens to the documents that govern their lives. See, e.g., Building Officials & Code Adm. v. Code Technology, Inc., 628 F.2d 730, 733-35 (1st Cir. 1980).

524. The decision had a similar effect on law reporting at every level, both state and federal. Nowhere was the surge of entrepreneurial energy more pronounced than in New York State, where access to the opinions of Chancellor Kent had long been impeded by the "exorbitant price asked by the booksellers" for Johnson's *Reports*. Anticipating in 1836 the imminent publication of Johnson's *Chancery Reports Condensed* by an unnamed "gentleman of the profession" other than Johnson, a legal periodical observed:

The decision of the Supreme Court of the United States, in the case of *Wheaton v. Peters*, . . . has entirely shaken the right of property in the written opinions of any court. It is presumed that no just cause of complaint will exist in any quarter, if the admirable judgments of Chancellor Kent should be released from the state of confinement in which they are at present kept by means of the large sums asked for the volumes which contain them. The more extended circulation, which they will naturally have, if published in a cheaper form than that in which they now appear, will contribute to the already wide-spread fame of Chancellor Kent, and to the increase among the profession of a knowledge of the principles of Equity which he has expounded with so much learning and eloquence.

In Preparation, 15 AM. JURIST & L. MAG. 249 (1836). Kent's friend and colleague, Justice Story, could not have put the matter better himself.

525. The current law of notice, deposit and registration is found at 17 U.S.C. §§ 401-412 (1982).

a monopoly recognized by law primarily for the benefit of the public rather than the author, and is therefore attended by appropriate limitations and conditions — has remained the cornerstone of construction in this field down to the present day.⁵²⁶ Likewise, the federal courts have never since doubted that, upon publication, the author's common law right of property in his manuscript comes to an end, to be replaced, if at all, by an entirely new statutory right in the copies of his work;⁵²⁷ or that, in deference to the public's paramount interest in the wide dissemination of ideas, the latter right may be fully secured only upon faithful compliance with the formalities prescribed by Congress.⁵²⁸

From an institutional perspective, however, there was more to *Wheaton v. Peters* than its copyright aspects alone, however important those aspects may have been. The case marked the culmination of a long struggle by the Reporters and their friends on the Court which, by 1834, had already contributed greatly to the transformation and expansion of the Court's role in American life. Contemporaries were not insensitive to these facts, although later generations have tended to overlook them. In reviewing the part that the *Reports* of Henry Wheaton had played in the growth of federal judicial power through 1824, the editors of the *North American Review* observed:

The Supreme Court of the United States did not rise up, like the state courts, merely as a successor, almost unchanged in form or name, of institutions over which a hundred years had accumulated the veneration of populous colonies, or powerful provinces. . . . It was a court wholly

526. For discussion of the Jacksonian anti-monopoly character of the McLean opinion, see G. DUNNE, *supra* note 125, at 326; L. PATTERSON, *supra* note 504, at 209.

The present Court, in its widely noted "Betamax" decision handed down last Term, stated the premise of the copyright law as follows:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.

Sony Corp. v. Universal City Studios, 104 S.Ct. 774, 782 (1984).

527. The leading modern authority on copyright in America states succinctly: "*Wheaton v. Peters* is a significant landmark . . . because it established the American view that publication *ipso facto* divested an author of common law copyright protection. . . . The *Wheaton* decision rested . . . on the simple basis that . . . an author may protect published works, if at all, only under the federal copyright statute." 1 M. NIMMER, *NIMMER ON COPYRIGHT* § 4.02[C], at 4-13 (1984).

528. "No one can deny that when the legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed . . ." 33 U.S. (8 Pet.) at 663-64. The Copyright Act of 1976, while providing the author liberal opportunities to cure deficiencies in his or her compliance with the statutory formalities, does not dispense altogether with such requirements. Failure to comply may result in fines, diminish the copyright holder's remedies or, in some instances, entirely preclude bringing an action for infringement. See, e.g., 17 U.S.C. §§ 405-07, 411-12 (1982).

new in its name, organization, powers, process, thrown forth on the country in naked simplicity, instead of being invested with the prescriptive respect due or deferred to ancient institutions. . . . With such an immense mass of obstacles for it to struggle through, in order to reach its present dignity and maturity, it needed all the influence of sober and reflecting men, all the concentrated strength of national authority, all the virtues of judges like Jay, Rutledge and Marshall, of master minds and pure patriots, to ensure its success.⁵²⁹

By his “care,” “industry” and “skill,” Wheaton, the Court’s “faithful and accomplished reporter,” had helped materially to ensure that “the broad scope of the important principles established” by the decisions of the Court “w[ould] continue to acquire increased value, interest, and importance” with each passing year.⁵³⁰

It had not always been so with the *Reports*. Dallas, the Court’s first Reporter, had inaugurated the series with a record of omission and inaccuracy scarcely calculated to ensure universal knowledge or approbation of the fledgling tribunal he reported. Cranch, his immediate successor, had elevated delay, an occasional failing in Dallas’ time, to a level of intolerable magnitude. Yet both Dallas and Cranch had undertaken their tasks without assurance of reward, and ultimately each found his service to the Court profoundly unremunerative. Neither can be judged by the standards that their successors established. Dallas assured that the earliest judgments of the Court would be preserved for posterity, while in the end Cranch provided an invaluable record of the work of Marshall and his colleagues on the bench at the dawn of the institution’s power. If it is true that, prior to Wheaton, “little was known of [the decisions of the Supreme Court] by the general public or even by the Bar,”⁵³¹ the fault lay as much in the absence of a formal reporter system with defined responsibilities as it did in the Reporters themselves.

Wheaton’s appointment in 1816 effectively brought an end to the old system by the introduction of complete, meticulous and timely reports unlike any that had gone before. The passage of the Reporter’s Act in the following year made the revolution official. In addition to his many other virtues, Wheaton brought to his duties a scholarly aptitude and zeal unique in the history of the reportership. Unhappily, that very quality (and the increased activity of the Court in Wheaton’s time) led to an escalation of the expense of the *Reports* that eventually overshadowed, in the mind of the profession, all else in Wheaton’s

529. 18 N. AM. REV. 371, 372-73 (1824).

530. *Id.*

531. 1 C. WARREN, *supra* note 12, at 455.

work.⁵³²

Wheaton's successor, Peters, although apparently not burdened by the weight of an overpowering intellect, did possess one useful quality of mind that all of his predecessors had conspicuously lacked: real business acumen. Peters' genius lay in his recognition that there existed in the new nation a substantial and as yet untapped market for reports of the decisions of the Supreme Court, ready to be exploited if only the cost of obtaining them could be reduced dramatically. This, Peters accomplished. In the process, and quite inadvertently, he occasioned young America's first landmark decision in the law of literary property.⁵³³

Of all the players in the drama that ultimately became *Wheaton v. Peters*, however, none performed a more interesting and important part than Joseph Story. Story had been instrumental in supplanting Cranch; he had proven an invaluable ally to Wheaton both in his appointment as Reporter and in the preparation of his annual *Reports* and his 1821 *Digest*; and his support for Peters' project to publish a "compressed Edition" of the Court's decisions had been early and unstinting. Nothing in Story's correspondence or character as described by those who knew him casts the slightest doubt on the genuineness of his affection for the many reporters whom he befriended and encouraged on circuit and at the Supreme Court throughout his long career. But without question the overriding purpose of these exertions, as of Story's entire public life, was as he described it to Wheaton early on: "the establishment of a great national policy on all subjects."⁵³⁴ How natural, then, that Story should have been the draftsman of the Act constituting the Reporter a salaried official of the

532. Upon Wheaton's death, a German obituary preserved in the family scrapbook proclaimed his *Reports* "the golden book of American national law." Obituary (original source unknown), Wheaton Papers, *supra* note 1. In every respect, the assessment was remarkably apt.

533. Ironically, Peters' heirs eventually became victims of the new freedom in reporting won by their forebearer at such great expense to Wheaton and his heirs. In the 1850s, Peters' *Reports* and *Condensed Reports* were themselves superseded by Justice Benjamin R. Curtis' edition of the *Reports*. Whereas, in the old Reporter series, 58 volumes had been priced at \$222, Curtis offered 22 volumes, covering the same body of opinions, for \$66. F. HICKS, *supra* note 441, at 211; C. SWISHER, *supra* note 8, at 313-14.

534. Joseph Story to Henry Wheaton (Dec. 13, 1815), reprinted in 1 LIFE AND LETTERS, *supra* note 137, at 270-72. Story's list of the objects to which he was passionately committed included:

a [national] navigation act; . . . the extension of the jurisdiction of the Courts of the United States over the whole extent contemplated in the Constitution; the appointment of national notaries public, and national justices of the peace; national port wardens and pilots for all the ports of the United States; a national bank, and national bankrupt laws.

He had "meditated much on all these subjects," Story informed Wheaton, "and ha[d] the details in a considerable degree arranged in [his] mind." *Id.*

Court, and the guiding light in every improvement by the Reporters in the performance of their duties.

Story's part in the determination of *Wheaton v. Peters*, not surprisingly, made him in the eyes of his former protégé, Wheaton, "the prime mover and instigator in Peters' piratical attack on [Wheaton's] property in the Reports."⁵³⁵ There had been but a "nominal majority" for the decision.⁵³⁶ Story himself had loaded the "blunderbuss of infidelity" discharged by McLean,⁵³⁷ while the mad Duvall was "notoriously incapable of understanding any thing about it."⁵³⁸ Wheaton even imagined that Story had deluded Marshall into concurring with his diabolical plan: the Chief Justice "*never studied the cause, . . . [but instead] pinned his faith on the sleeve of his prevaricating brother, believing that, if the latter had any leaning, it was towards me on the score of the friendship the hypocrite once professed — & which doubtless he still continued to pour into that venerable man's ear.*"⁵³⁹ In short, Story had "betrayed [Wheaton], Judas-like, with a kiss."⁵⁴⁰

The truth was otherwise. The circumstances of the case, at least as viewed in historical perspective, are utterly devoid of any hint of personal animosity toward Wheaton by any member of the majority. Moreover, on the decision's central point — the noncopyrightability of the opinions of the Justices — there was unanimity: the Court could allow no impediment to the fullest possible dissemination of its judgments. The needs of the Court and the nation simply outweighed the needs of a single Reporter, however deserving. At a personal level, Story in fact found the necessity of deciding against Wheaton, his former friend and collaborator, a "bitter cup."⁵⁴¹ At the professional level, however, Story simply embodied the instinct and will of a Court determined to be faithful both to the law and to its own institutional interests. In this instance, as in so many others, Carson's assessment

535. Henry Wheaton to Catherine Wheaton (Mar. 20, 1834), Wheaton Papers, *supra* note 1.

536. Henry Wheaton to Charles Chauncey (June 11, 1834), Cadwalader Papers, *supra* note 521.

537. Henry Wheaton to Levi Wheaton (Mar. 20, 1834), Wheaton Papers, *supra* note 1.

538. Henry Wheaton to Charles Chauncey (June 11, 1834), Cadwalader Papers, *supra* note 521 (emphasis in original).

539. Henry Wheaton to Eliza W. Lyman (his sister) (May 14, 1837), Hay Library Papers, *supra* note 152 (emphasis in original).

540. Henry Wheaton to Levi Wheaton (Mar. 20, 1834), Wheaton Papers, *supra* note 1.

541. Story confided to his friend Chancellor Kent:

I am sorry for the controversy . . . [and] wish Congress would make some additional provisions on the subject, to protect authors, of whom I think no one more meritorious than Mr. Wheaton. You, as a Judge, have frequently had occasion to know how many bitter cups we are not at liberty to pass by.

Joseph Story to James Kent (May 17, 1834), *reprinted in* 2 LIFE AND LETTERS, *supra* note 137, at 182.

of Story's role in the Marshall Court's rise to power is amply confirmed: "he did more, perhaps, than any other man who ever sat upon the Supreme Bench to popularize the doctrines of that great tribunal and impress their importance and grandeur upon the public mind."⁵⁴²

In the end, *Wheaton v. Peters* is a "great case" for none of the reasons usually associated with Marshall Court decisions. Its focus is not predominately constitutional, nor can it claim authorship by the Chief Justice himself or even by Justice Story. Rather, the "greatness" of the case lies in what it tells us about the Court itself — its strengths and its weaknesses, its personnel and its conflicts, its aspirations and, above all, its achievements — during a critical passage in the life of a vitally important national institution. Few cases tell stories so fascinating as *Wheaton v. Peters*, and few have been so long neglected. Wheaton himself put the matter best: "The incidents attending this case, should they ever be given to the world, would form a curious chapter in the history of judicature & indeed of human nature."⁵⁴³

So, now, they do.

542. H. CARSON, *supra* note 12, at 234.

543. Henry Wheaton to Levi Wheaton (Apr. 15, 1840), *Wheaton Papers*, *supra* note 1.