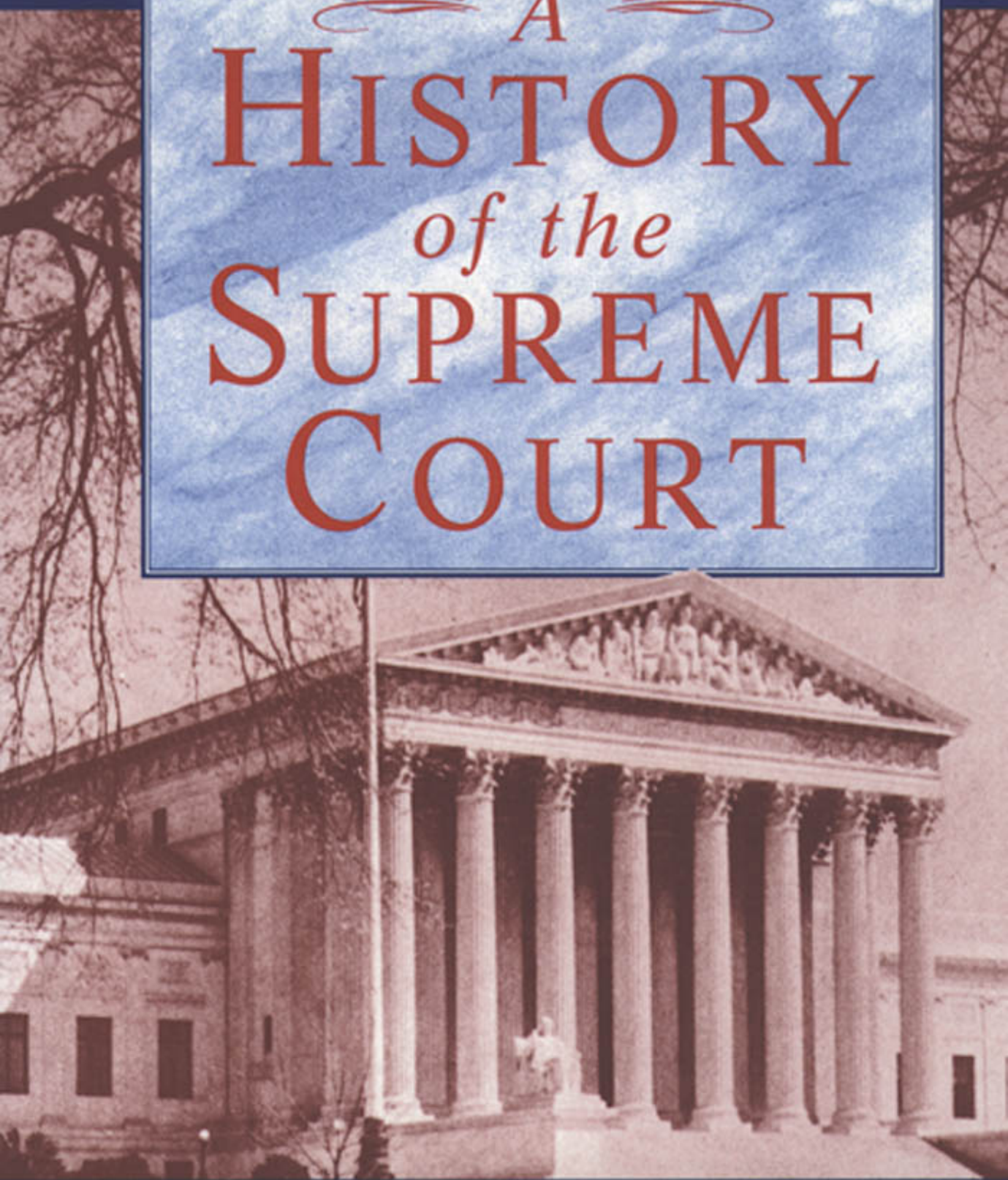
A History of the Supreme Court



Bernard Schwartz

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BERNARD SCHWARTZ

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Preface

There is no good one-volume history of the United States Supreme Court. The Holmes Devise history is too massive to be usable except for scholars engaged in research, and other histories, such as that by Robert McCloskey, are too short and hence largely superficial. I hope that this book will correct the situation. It tells the story of the Court over the years since its first session in 1790. The emphasis is on the history of the Court in relation to the development of the nation. The theme is that of the Court as both a mirror and a motor—reflecting the development of the society which it serves and helping to move that society in the direction of the dominant jurisprudence of the day.

The organization of the book is chronological. In addition to the chapters on the Court under the different Chief Justices, there are chapters on four watershed cases—landmark cases that bring into sharp focus both how the Court operates and the impact of major decisions upon the nation and on the Court itself. My hope is that the audience for this book will not be limited to specialists in the subject. I have tried to write in a nontechnical manner to make the work less forbidding to the general reader who is normally "turned off" by a book written by a law professor. War, according to the famous aphorism, is too important a matter to be left to the generals. The work of the Supreme Court is similarly too significant in a country such as ours to be left only to the lawyers and law professors. This is particularly true of the historical functioning of the highest tribunal. It is scarcely possible to understand American history fully without an understanding of the part played in that history by the Supreme Court. In so

many cases, the decisions of the Court have become a vital part of the story of the nation's development.

I will be more than rewarded for my efforts if this survey of the Supreme Court's history proves useful to the growing number of those who desire to learn more about the institution that plays such a vital part in the polity.

Tulsa, Okla. B. S.
1993

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Introduction: "The Very Essence of Judicial Duty"

"Human history," says H. G. Wells, "is in essence a history of ideas."[1] To an American interested in constitutional history, the great theme in the country's development is the idea of law as a check upon governmental power. The institution that best embodies this idea is the United States Supreme Court. But the Court itself is the beneficiary of a constitutional heritage that starts centuries earlier in England.

Seedtime of Judicial Review

Chief Justice John Marshall tells us that the power to determine constitutionality "is of the very essence of judicial duty."[2] To an American interested in the development of the Marshall concept, as good a starting point as any is the dramatic assertion of the supremacy of law by Sir Edward Coke on November 13, 1608.[3] For it was on that day that James I confronted "all the Judges of England and Barons of the Exchequer" with the claim that, since the judges were but his delegates, he could take any case he chose, remove it from the jurisdiction of the courts, and decide it in his royal person. The judges, as James saw it, were "his shadows and ministers . . . and the King may, if he please, sit and judge in Westminster Hall in any Court there and call their Judgments in question."[4]

"To which it was answered by me," states Chief Justice Coke, "in the presence, and with the clear consent of all the Judges . . . that the King in his own person cannot adjudge any case . . . but that this ought to be determined and adjudged in some Court of Justice, according to the law

and custom of England." To this James made the shrewd reply "that he thought the law was founded upon reason, and that he and others had reason as well as the Judges."

Coke then delivered his justly celebrated answer, "that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognisance of it: that the law was the golden met-wand and measure to try the causes of the subjects."[5]

It is hardly surprising that the King was, in Coke's description "greatly offended." "This means," said James, "that I shall be under the law, which it is treason to affirm." "To which," replied Coke, "I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege* [that the King should not be under man but under God and law]."

Needless to say, the King's anger only increased. According to one onlooker, in fact, "[H]is Majestie fell into that high indignation as the like was never knowne in him, looking and speaking fiercely with bended fist, offering to strike him, etc."[6]

James's indignation was well justified. Coke's articulation of the supremacy of law was utterly inconsistent with royal pretensions to absolute authority. In the altercation between Coke and the King, indeed, there is personified the basic conflict between power and law which underlies all political history. Nor does it affect the importance of Coke's rejection of James's claim that, with the King's fist raised against him, Coke was led personally to humble himself. That he "fell flatt on all fower"[7] to avoid being sent to the Tower does not alter the basic boldness of his clear assertion that the law was supreme even over the Crown.

Nor did Coke stop with affirming that even the King was not above the law. In *Dr. Bonham's Case*[8]—perhaps the most famous case decided by him—Coke seized the occasion to declare that the law was above the Parliament as well as above the King. Dr. Bonham had practiced physic without a certificate from the Royal College of Physicians. The College Censors committed him to prison, and he sued for false imprisonment. The college set forth in defense its statute of incorporation, which authorized it to regulate all physicians and punish with fine and imprisonment practitioners not admitted by it. The statute in question, however, gave the college one-half of all the fines imposed. This, said Coke, made the college not only judges, but also parties, in cases coming before them, and it is an established maxim of the common law that no man may be judge in his own cause.

But what of the statute, which appeared to give the college the power to judge Dr. Bonham? Coke's answer was that even the Parliament could

not confer a power so contrary to common right and reason. In his words, "[I]t appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."[9]

Modern scholars have debated the exact meaning of these words. To the men of the formative era of American constitutional history, on the other hand, the meaning was clear. Chief Justice Coke was stating as a rule of positive law that there was a fundamental law which limited Crown and Parliament indifferently. Had not my Lord Coke concluded that when an Act of Parliament is contrary to that fundamental law, it must be adjudged void? Did not this mean that when the British government acted toward the Colonies in a manner contrary to common right and reason, its decrees were of no legal force?

The men of the American Revolution were nurtured upon Coke's writings. *"Coke's Institutes,"* wrote John Rutledge of South Carolina, "seem to be almost the foundation of our law."[10] Modern writers may characterize Coke as an obsolete writer whom the British Constitution has outgrown. Americans of the eighteenth century did not have the benefit of such ex post facto criticism. To them, Coke was the contemporary colossus of the law—"our juvenile oracle," John Adams termed him in an 1816 letter[11]—who combined in his own person the positions of highest judge, commentator on the law, and leader of the Parliamentary opposition to royal tyranny. Coke's famous *Commentary upon Littleton,* said Jefferson, "was the universal elementary book of law students and a sounder Whig never wrote nor of profounder learning in the orthodox doctrines of . . . British liberties."[12] When Coke, after affirming the supremacy of the law to royal prerogative, announced, "It is not I, Edward Coke, that speaks it but the records that speak it,"[13] men on the western side of the Atlantic took as the literal truth his assertion that he was only declaring, not making law.

Coke's contribution to constitutionalism was thus a fundamental one. He stated the supremacy of law in terms of positive law. And it was in such terms that the doctrine was of such import to the Founders of the American Republic. When they spoke of a government of laws and not of men, they were not indulging in mere rhetorical flourish.

Otis and Unconstitutionality

The influence of Coke may be seen at all of the key stages in the development of the conflict between the Colonies and the mother country. From Whitehall Palace, to which King James had summoned the judges in 1608, to the Council Chamber of the Boston Town House a century and a half later was not really so far as it seemed. "That council chamber," wrote John

Adams over half a century after the event, "was as respectable an apartment as the House of Commons or the House of Lords in Great Britain. . . . In this chamber, round a great fire, were seated five Judges, with Lieutenant Governor Hutchinson at their head, as Chief Justice, all arrayed in their new, fresh, rich robes of scarlet English broadcloth; in their large cambric bands, and immense judicial wigs."[14] For it was in this chamber that, in 1761, James Otis delivered his landmark attack in *Lechmere's Case*[15] against general writs of assistance.

The Otis argument in *Lechmere's Case* has been characterized as the opening gun of the American Revolution. In it, Otis with "a torrent of impetuous eloquence . . . hurried away everything before him." He argued the cause, Otis declared, "with the greater pleasure . . . as it is in opposition to a kind of power, the exercise of which, in former periods of English history, cost one King of England his head, and another his throne."[16] If Patrick Henry came close to treason in his famous 1765 speech attacking the Stamp Act, he at least had an excellent model in this Otis speech.

To demonstrate the illegality of the writs of assistance, Otis went straight back to Coke. As Horace Gray (later a Justice of the Supreme Court) put it in an 1865 comment, "His main reliance was the well-known statement of Lord Coke in *Dr. Bonham's Case.*"[17] This may be seen clearly from John Adams's summary of the Otis argument: "As to acts of Parliament. An act against the Constitution is void: an Act against natural Equity is void; and if an Act of Parliament should be made in the very words of the petition, it would be void. The . . . Courts must pass such Acts into disuse."[18]

The Otis oration, exclaimed Adams, "breathed into this nation the breath of life," and "[t]hen and there the child Independence was born."[19] To which we may add that then and there American constitutional law was born. For Otis, in Justice Gray's words, "denied that [Parliament] was the final arbiter of the justice and constitutionality of its own acts; and . . . contended that the validity of statutes must be judged by the courts of justice; and thus foreshadowed the principle of American constitutional law, that it is the duty of the judiciary to declare unconstitutional statutes void."[20]

Coke's biographer tells us that he would have been astonished at the uses to which *Dr. Bonham's Case* was put.[21] Certain it is that Otis and those who followed in his steps went far beyond anything the great English jurist had expressly intended. Yet had not Coke's own attitude been stated in his picturesque phrase: "Let us now peruse our ancient authors, for out of the old fields must come the new corne."?[22] That is precisely what Americans have done in using Coke as the foundation for the constitutional edifice which, starting with Otis's argument, they have erected. Coke himself would not have been disturbed by the fact that, though the fields were old, the corn was new.

State Precursors

Throughout the Revolutionary period, Americans relied upon their possession of the rights of Englishmen and the claim that infringement upon those rights was unconstitutional and void. That claim could not, however, rest upon a secure legal foundation until the rights of Americans were protected in written organic instruments. Such protection came with the adoption of written constitutions and bills of rights in the states, as soon as independence had severed their ties with the mother country.

How were the rights guaranteed by these new constitutions to be enforced? The American answer to this question was, of course, ultimately, judicial review. That answer was first given during the period between the Revolution and the ratification of the Federal Constitution. By the end of the period, an increasing number of Americans accepted the view that laws might "be so unconstitutional as to justify the Judges in refusing to give them effect."[23] Oliver Ellsworth, later the third Chief Justice of the United States, was stating far from radical doctrine when he asserted in the 1788 Connecticut ratifying convention, "If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void and the judicial power . . . will declare it to be void."[24]

Between 1780 and 1787 cases in a number of states saw direct assertions of judicial power to rule on constitutionality. There has been some dispute about whether these cases really involved judicial review. Much of the difficulty in assessing their significance arises from the fact that no meaningful reporting of cases in the modern sense existed at the time these cases were heard and decided. Reported opinions were mainly skimpy or nonexistent. For most of these early cases, recourse has to be had to other materials (such as newspapers and pamphlets) rather than to law reports of the modern type.

The first of the pre-Constitution review cases was the 1780 New Jersey case of *Holmes v. Walton*.[25] A 1778 statute, aimed at traffic with the enemy, permitted trial by a six-man jury and provided for punishment by property seizures. The statute was attacked on the ground that it was "contrary to the constitution of New Jersey." The claim was upheld by the court, though the actual decision has been lost. From other materials, it appears that the decision was based on the unconstitutionality of the six-man jury.[26] Some recent commentators have attacked the conclusion that *Holmes v. Walton* set a precedent for judicial review. It was, however, widely thought of as such at the time the Federal Constitution and Bill of Rights were adopted. Soon after the case was decided "a petition from sixty inhabitants of the county of Monmouth" was presented to the New Jersey Assembly. It complained that "the justices of the Supreme Court have set aside some of the laws as unconstitutional." In 1785, Gouverneur Morris sent a message to the Pennsylvania legislature that mentioned "a law as once passed in New Jersey, which the judges pronounced unconstitutional, and therefore void."[27] In addition, there is an 1802 case that

states that in *Holmes v. Walton,* an "act upon solemn argument was adjudged to be unconstitutional and in that case inoperative."[28] At the least, these indicate that comtemporaries did regard *Holmes v. Walton* as a precedent for judicial review.

The second case involving judicial review was *Commonwealth v. Caton,*[29] decided in 1782 by the Virginia Court of Appeals. It has been widely assumed, relying on the report of the case in Call's Virginia Reports, that *Caton* was the strongest early precedent for judicial review. The language in Call is, indeed, unequivocal. "[T]he judges, were of opinion, that the court had power to declare any resolution or act of the legislature, or of either branch of it to be unconstitutional and void; and, that the resolution of the house of delegates, in this case, was inoperative, as the senate had not concurred in it."[30]

Call's report on *Caton* was not published until 1827; it was based upon the reporter's reconstruction of the case from surviving records, notes, and memoranda. There are significant differences between the Call report and the contemporary notes of Edmund Pendleton, who presided over the *Caton* court. According to Pendleton's account, only one of the eight judges ruled that the statute at issue was unconstitutional, though two others did assert judicial power to declare a law void for repugnancy to the Constitution. The two judges in question were Chancellor George Wythe and Pendleton himself. Wythe, perhaps the leading jurist of the day, delivered a ringing affirmation of review authority, declaring that if a statute conflicted with the Constitution, "I shall not hesitate, sitting in this place, to say, to the general court, Fiat justitia, ruat coelum; and, to the usurping branch of the legislature, you attempt worse than a vain thing."[31] Pendleton also stated that the "awful question" of voiding a statute was one from which "I will not shrink, if ever it shall become my duty to decide it."[32]

The *Caton* Court did not exercise the power to hold a law unconstitutional; the majority held "that the Treason Act was not at Variance with the Constitution but a proper exercise of the Power reserved to the Legislature by the latter."[33] Yet three judges did assert power in the courts to void statutes on constitutional grounds, including the two most prestigious members of the court. And it was Wythe's words, in particular, Pendleton's biographer tells us, that were "preserved in the court reports, and they were never forgotten by lawyers and students of government, by whom they were repeated again and again to men who would arrogate to themselves unconstitutional powers or seek to circumvent constitutional limitations."[34]

The most noted of the pre-Constitution review cases[35] was the 1784 New York case of *Rutgers v. Waddington.*[36] It was noted in its day because of Alexander Hamilton's argument for the defendant and because the court's opinion, published at the time, made a considerable stir. It is the best documented of these early cases. Strictly speaking, *Rutgers v. Waddington* did not involve a review of constitutionality but only of judicial

power to annul a state statute contrary to a treaty and the law of nations. The statute in question provided for a trespass action against those who had occupied property during the British occupation of New York and barred defendants from any defense based on the following of military orders. Waddington was a British merchant who had occupied Mrs. Rutgers's abandoned property under license of the Commander-in-Chief of the British army of occupation. Hamilton argued that the statutory bar was in conflict both with the law of nations (since defendant had occupied the premises under British authority and thus derived the right of the military occupier over abandoned property sanctioned by the law of war) and the peace treaty with Britain. As stated by the editor of Hamilton's legal papers, he urged that "a court must apply the law that related to a higher authority in derogation of that which related to a lesser when the two came in conflict."[37]

The court agreed that the statute could not override a treaty or international law and refused to apply it to the extent that there was any conflict. Whether or not *Rutgers v. Waddington* may be regarded as a precedent for judicial review, its lesson was not lost on the Framers' Convention; by the Supremacy Clause state judges were directed to set aside state laws that conflicted with treaties. Certainly, Hamilton's assertion of review power in the courts made *Rutgers v. Waddington* "a marker on the long road that led to judicial review."[38]

The next case involving judicial review was the 1786 Rhode Island case of *Trevett v. Weeden*. That case, too, was unreported, but it was widely known through a 1787 pamphlet published by James M. Varnum (better known as one of Washington's generals), who argued the case against the statute.[39] Varnum's argument received wide dissemination and demonstrated the unconstitutionality of a legislative attempt to deprive Weeden of his right to trial by jury. Weeden, a butcher, was prosecuted under a statute making it an offense to refuse to accept paper money of the state in payment for articles offered for sale—in this case, meats. Appearing for the defense Varnum resorted to the modern distinction between the constitution and ordinary statute law,[40] arguing that the principles of the constitution were superior because they "were ordained by the people anterior to and created the powers of the General Assembly." It was the duty of the courts to measure laws of the legislature against the constitution. The judiciary's task was to "reject all acts of the Legislature that are contrary to the trust reposed in them by the people."[41] That the Rhode Island judges agreed with Varnum is shown by the following brief newspaper account:

> The court adjourned to next morning, upon opening of which, Judge Howell, in a firm, sensible, and judicious speech, assigned the reasons which induced him to be of the opinion that the information was not cognizable by the court, declared himself independent as a judge, the penal law to be repugnant and unconstitutional, and therefore gave it as his opinion that the court could not take cognizance of the information! Judge Devoe was of the same opinion. Judge

> Tillinghast took notice of the striking repugnancy of the expressions of the act . . . and on that ground gave his judgment the same way. Judge Hazard voted against taking cognizance. The Chief Justice declared the judgment of the court without giving his own opinion.[42]

The clearest pre-Constitution case involving review power was the North Carolina case of *Bayard v. Singleton,*[43] decided in May 1787, just before the Philadelphia Convention. The contemporary account in the North Carolina Reports shows that the judges there realized the implications of what they were doing when they held that a statute contrary to the guaranty of trial by jury in cases involving property in the North Carolina Declaration of Rights "must of course . . . stand as abrogated and without any effect." No "act they could pass, could by any means repeal or alter the constitution" so long as the constitution remains "standing in full force as the fundamental law of the land."[44]

James Iredell, later a Justice of the Supreme Court, had been attorney for the plaintiff in *Bayard v. Singleton.* While attending the Framers' Convention, Richard Dobbs Spaight wrote to Iredell condemning the *Bayard* decision as a "usurpation," which "operated as an absolute negative on the proceedings of the Legislature, which no judiciary ought ever to possess." Iredell replied that "it has ever been my opinion, that an act inconsistent with the Constitution was void; and that the judges, consistently with their duties could not carry it into effect." Far from a "usurpation," the power to declare unconstitutional laws void flowed directly from the judicial duty of applying the law: "[E]ither . . . the *fundamental unrepealable* law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on authority not given by the people." The exercise of review power, said Iredell, was unavoidable. "It is not that the judges are appointed arbiters . . . but when an act is necessarily brought in judgment before them, they must, unavoidably, determine one way or another. . . . Must not they say whether they will obey the Constitution or an act inconsistent with it?"[45]

To be sure, these pre-Constitution assertions of review power did not go unchallenged. After *Rutgers v. Waddington,* the New York Assembly passed a resolution attacking the asserted power of the courts.[46] An open letter in a newspaper went even further, asserting, "That there should be a power vested in courts of judicature whereby they might controul the supreme Legislative power we think is absurd in itself. Such power in courts would be destructive of liberty, and remove all security of property."[47]

The reaction to *Trevett v. Weeden* was even stronger. The Rhode Island Legislature ordered the judges to appear before it "to render their reasons for adjudging an act of the General Assembly unconstitutional, and so void."[48] Then, as Madison was to explain it to the Framers' Convention, "In Rhode Island the judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislature who would be willing instruments of the wicked and arbitrary plans of their masters."[49]

The important thing, however, is that despite such opposition, the judges did exercise the review power during the pre-Constitution period. The judicial groundwork was thus laid for the assertion of the power that has made the U.S. Supreme Court the fulcrum of our constitutional system.

Constitution and Ratification

The men who came to Philadelphia in the sultry summer of 1787 had the overriding aim of making such alterations in the constitutional structure as would, in the words of the Confederation Congress calling the convention, "render the Federal Constitution adequate to the exigencies of Government."[50] To accomplish that goal, they drafted a new charter providing for a Federal Government endowed with the authority needed to enable it to operate effectively.

The Articles of Confederation had concentrated all the governmental authority provided for under it in a unicameral legislative body. Before the Constitution, "Congress was the general, supreme, and controlling council of the nation, the centre of union, the centre of force, and the sun of the political system."[51] In the Confederation, there was no separate Executive and the only federal courts were those Congress might set up for piracy and felony on the high seas and for appeals in prize cases.

From the beginning of their deliberations, the Framers agreed that the new government they were creating should be based upon the separation of powers. It was, Madison told the Convention, "essential . . . that the Legislative: Executive: and Judicial powers be separate . . . [and] independent of each other."[52] Accordingly, the Virginia Plan drafted by him, which served as the basis for the new Constitution, provided expressly: "That a national government ought to be established consisting of a supreme legislative, judiciary and executive."[53]

In basing their deliberations upon Madison's plan, the Framers decided, at almost the outset of their deliberations, that there should be a federal judiciary and that it should be "supreme." The resolutions introduced to give effect to the plan provided that "a National Judiciary be established," to consist of both a supreme tribunal and inferior tribunals.[54] The federal courts were thus to be modeled upon the colonial and state court systems—consisting, as they did, of both inferior courts and a central high court.

Although attention was paid to the judiciary during the Convention debates, "[t]o one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention."[55] The only serious objection was that to inferior federal courts, which some saw as an encroachment upon the states. The difficulty was resolved by a compromise: inferior courts were not required, but Congress was permitted to create them.[56]

The Framers were, of course, familiar with the preindependence judi-

cial system, under which appeals could be taken to a central appellate tribunal. The proposal for a Federal Supreme Court was adopted with practically no discussion. The Convention considered and rejected a number of motions that would have been inconsistent with the judicial function and might have impaired the independence of the new supreme tribunal—notably one to set up a Council of Revision composed of the Executive and "a convenient number of the National Judiciary" to veto acts passed by Congress, as well as one "that all acts before they become laws should be submitted both to the Executive and Supreme Judiciary Departments."[57] There was debate about who should appoint the federal judges as well as their jurisdiction. In the end, however, the Judiciary Article was adopted essentially as it had been drafted by those who sought a strong national government—especially by its principal draftsman, Oliver Ellsworth.

The Constitution does not, to be sure, specifically empower the federal courts to review the constitutionality of laws. But it does contain provisions upon which judicial review authority can be based. The jurisdiction vested in the new judiciary extends to all "Cases . . . arising under this Constitution, the Laws of the United States, and Treaties." Even more important was the Supremacy Clause of article VI, added on motion of John Rutledge, who was appointed to the first Supreme Court and also served briefly as the second Chief Justice. The supremacy of the Constitution was expressly proclaimed as the foundation of the constitutional structure. And since only "Laws . . . made in pursuance" of the Constitution were given the status of "supreme law," laws repugnant to the Constitution were excluded from the imperative of obedience.

At various times during their debates, the Framers asserted that, in Elbridge Gerry's words, "the Judiciary . . . by their exposition of the laws" would have "a power of deciding on their Constitutionality."[58] Those who did so included Gerry himself, James Wilson,[59] and James Madison,[60] as well as opponents of the Constitution such as Luther Martin[61] and George Mason.[62] Even those who were troubled by such a power in the courts conceded that they saw no workable alternative. As John Dickinson put it, "He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute."[63]

Madison, too, saw dangers in judicial review, which, he said in 1788, "makes the Judiciary Department paramount in fact to the Legislature, which was never intended and can never be proper."[64] Yet Madison also concluded his discussion of the matter by stating, "A law violating a constitution established by the people themselves, would be considered by the Judges as null and void."[65]

During the ratification debates of 1787–1788, both supporters and opponents of the Constitution assumed that judicial review would be an essential feature of the new organic order. "If they were to make a law not warranted by any of the powers enumerated," declared John Marshall in the Virginia ratifying convention, "it would be considered by the judges as

an infringement of the Constitution which they are to guard. . . . They would declare it void."[66]

The Anti-Federalist *Brutus* letters, which Hamilton sought to answer in *The Federalist,* agreed with Marshall. If Congress, Brutus wrote, should "pass laws, which, in the judgment of the court, they are not authorized to do by the constitution, the court will not take notice of them . . . they cannot therefore execute a law, which, in their judgment, opposes the constitution."[67]

To opponents of the Constitution, judicial review was one of the new instrument's great defects. Because of it, Brutus wrote, "I question whether the world ever saw . . . a court of justice invested with such immense powers" as the Supreme Court.[68] There would be no power to control their decisions. In such a situation and vested with full judicial independence, the new Justices would "feel themselves independent of Heaven itself."[69]

The most effective defense of the federal judiciary and its review power was, of course, that by Hamilton in *The Federalist*—itself called forth by the challenge presented by the *Brutus* argument. Most important for our purposes was the defense of judicial review in No. 78 of *The Federalist.* Hamilton's essay there stands as the classic pre-Marshall statement on the subject. American constitutional law has never been the same since it was published.

Hamilton's *Federalist* reasoning on review is based upon the very nature of the Constitution as a limitation upon the powers of government. "Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."[70]

The courts, Hamilton urged, were designed to keep the legislature within constitutional limits. "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred: in other words, the constitution ought to be preferred to the statute; the intention of the people to the intention of their agents."[71]

Hamilton's reasoning here, and even his very language, formed the foundation for the *Marbury v. Madison*[72] confirmation of judicial review as the core principle of the constitutional system. The *Marbury* opinion can, indeed, be read as more or less a gloss upon *The Federalist,* No. 78.

Judiciary Act

The Constitution's Judiciary Article was, of course, not self-executing. Before the federal courts, including the Supreme Court, could come into existence, they had to be provided for by statute. The first Congress passed the necessary law when it enacted the Judiciary Act of 1789—the law that both created the Supreme Court and set forth its jurisdiction. The key members of the Senate committee that drafted the statute were Oliver Ellsworth, later the third Chief Justice, and William Paterson, who was to become a Supreme Court Justice. The principal draftsman was Ellsworth; according to a senatorial opponent, "this Vile Bill is a child of his."[73]

The 1789 statute resolved the issue of whether there should be inferior federal courts in favor of their creation. It established the federal judiciary with a Supreme Court, consisting of six Justices, at its apex, and a two-tiered system of inferior courts, with district courts in each state at the base, and three circuit courts grouped into three circuits—the eastern, the middle, and the southern, each composed of two Supreme Court Justices and one district judge. The federal courts were given only limited jurisdiction; as it was put by a member of the Senate drafting committee, "it will not extend to a tenth part of the causes which *might* by the constitution come into the Federal Court."[74]

There was again little discussion on the establishment of the Supreme Court, though some opponents sought to reduce the number of Justices and even to dispense with a Chief Justice. The jurisdiction of the Court was provided for in the form it has retained throughout its history. Crucial was the fact that the Court was given appellate jurisdiction not only over the lower federal courts, but also, under section 25 of the Judiciary Act, over the state courts in cases involving federal questions. "A vital chapter of American history," Justice Frankfurter tells us, "derives from the famous twenty-fifth section of the Judiciary Act."[75] From 1789 to our own day, the Supreme Court's power to review state court decisions has been what the Court historian characterized as "the keystone of the whole arch of federal judicial power."[76] Because of section 25, indeed, William Paterson could state, in his notes on the Judiciary Bill debate, "The powers of the Supreme Court are great—they are to check the excess of Legislation."[77]

With the passage of the first Judiciary Act, the stage was set for the Supreme Court to play its part in the unfolding drama of the new nation's development. The actual scenario would, however, depend upon the personnel of the new tribunal and the manner in which they performed their awesome constitutional role.

1

The First Court, 1790–1801

Chief Justice Warren E. Burger once said "that he himself should be in a wig and gown, and had been cheated out of it by Thomas Jefferson."[1] The question of the Justices' attire was a controversial issue when the United States Supreme Court first met. As was to be expected, Hamilton was for the English wig and gown. Jefferson was against both, but he said that if the gown was to be worn, "For Heaven's sake, discard the monstrous wig which makes the English judges look like rats peeping through benches of oakum!"[2]

Jefferson's opposition (as well as that by other public figures, including Aaron Burr) carried the day. One of the first Justices, William Cushing, came to New York for the first Court session wearing his old-fashioned judicial wig. His appearance with it caused a commotion: "The boys followed him in the street, but he was not conscious of the cause until a sailor, who came suddenly upon him, exclaimed, 'My eye! What a wig!'" Then, we are told, Cushing, "returning to his lodgings, . . . obtained a more fashionable covering for his head. He never again wore the professional wig."[3] Nor did any of the other Supreme Court Justices.

When, on February 2, 1790, the Supreme Court met in its first public session in the Royal Exchange, at the foot of Broad Street in New York City, the Justices did not wear wigs. But they were elegantly attired in black and red robes, "the elegance, gravity and neatness of which were the subject of remark and approbation with every spectator."[4] The elegance of the Justices' attire could, however, scarcely serve to conceal the relative ineffectiveness of the first Supreme Court, at least by comparison with

what that tribunal was later to become. To understand the Court's position, it is necessary to look at the new judicial department not through twentieth-century spectacles but through the eyes of men living a decade after the Constitution went into effect. "The judiciary," wrote Hamilton in *The Federalist,* "is beyond comparison the weakest of the three departments of power."[5] This remark was amply justified by the situation of the fledgling Supreme Court.

It is hard for us today to realize that, at the beginning at least, a seat on the supreme bench was anything but the culmination of a legal career that it has since become. John Jay, the first Chief Justice, resigned to become Governor of New York, and Alexander Hamilton declined Jay's post, being "anxious to renew his law practice and political activities in New York." John Rutledge resigned his seat on the first Supreme Court to become Chief Justice of the South Carolina Court of Common Pleas. "[S]ince Marshall's time," as Justice Felix Frankfurter tells us, "only a madman would resign the chief justiceship to become governor"—much less a state judge.[6]

The weakness of the early Supreme Court is forcefully demonstrated by the fact that, in the building of the new capital, that tribunal was completely overlooked and no chamber provided for it. When the seat of government was moved to Washington, the high bench crept into an undignified committee room in the Capitol beneath the House Chamber.

Getting Under Way

With the opening of the Supreme Court, the tripartite governmental structure provided by the Framers was at last fully operative. Two days after the first session, a New York merchant wrote to a British friend, "Our Supreme Court was Opened the 2 Instant . . . we [are] now in Every Respect a Nation."[7]

The Supreme Court itself is established directly by the Constitution, which provides expressly for the existence of "one supreme Court." The Court could not, however, come into operation until the details of its organization and operation were provided by Congress. The Judiciary Act of 1789 set up a Supreme Court consisting of a Chief Justice and five Associate Justices and set forth the jurisdiction vested in it. But the President still had to appoint its members before the Court could come into existence.

President Washington took his responsibility in nominating Supreme Court Justices most seriously. In a famous letter to Edmund Randolph, the first Attorney General, Washington declared, "Impressed with a conviction, that the due administration of justice is the firmest pillar of good government, I have considered the first arrangement of the judicial department as essential to the happiness of our country, and to the stability of its political system." Because of this, the President wrote in his letters to his Supreme Court appointees, "I have thought it my duty to nominate for the

high offices in that department, such men as I conceived would give dignity and lustre to our national character."[8] Despite Washington's clear comprehension of the responsibility of making suitable appointments to the first Court, he found it most difficult to get men of stature to accept. The low prestige of the Court led a number of his first choices to prefer other positions.

John Jay was apparently the President's first choice as Chief Justice. A few months before the appointment, Vice President Adams had written, "I am fully convinced that Services, Hazard, Abilities and Popularity, all properly weighed, the Balance, is in favour of Mr. Jay."[9] Jay accepted the position, though he was concerned about the salary. While the appointment was pending, the Secretary of the Senate wrote to a Senator, "The Keeper of the Tower [i.e., Jay] is waiting to see which Salary is best, that of Lord Chief Justice or Secretary of State."[10]

In choosing the five Associate Justices, Washington followed the practice, since followed by many Presidents, of geographic representation. A letter he sent to Hamilton the day after his nominations emphasized the geographic dispersion of Court seats.[11] His choice for Chief Justice was from New York. The other appointees were from South Carolina (John Rutledge, Chief Justice of the state's Chancery Court), Pennsylvania (James Wilson, one of the first American law professors, who had played a leading part in the Constitutional Convention), Massachusetts (William Cushing, Chief Justice of the state's highest court), Maryland (Robert H. Harrison, Chief Judge of the Maryland General Court), and Virginia (John Blair, a judge on the Virginia Supreme Court of Appeals).

Though all the nominees were speedily confirmed by the Senate, Harrison declined the appointment because of poor health. He died two months later. "Poor Col. Harrison," wrote Washington to Lafayette, "who was appointed one of the Judges of the Supreme Court, and declined, is lately dead."[12] In Harrison's place, Washington chose James Iredell of North Carolina, who had served as a state judge and attorney general and had been a leader in the struggle for ratification of the Constitution in his state.

In a letter soon after his appointment, the new Justice described the functioning of the fledgling Court:

> There are to be 2 Sessions of the Supreme Court held at the seat of Gov. in each year & a Circuit Court twice a year in each State. The United States are divided into three Circuits—one, called the [Middle], consisting of New Jersey, Pennsylvania, Delaware, Maryland & Virginia; and the Southern, consisting at present of South Carolina & Georgia, to which I imagine North Carolina will be added. [There was also an Eastern Circuit, consisting of New York and the New England states.] The Circuit Courts are to consist of two Judges of the Supreme Court, and a Judge in each State appointed by the President who has in other respects a separate jurisdiction of a limited kind—Any two of these may constitute a Quorum.[13]

As already seen, the Supreme Court began its first sittings on February 2, 1790. During that session and the next two terms, there were no cases docketed for argument and the Justices had little to do. "There is little business but to organise themselves," wrote Congressman Abraham Baldwin, "and let folks look on and see they are ready to work at them."[14] De Witt Clinton confirmed this assessment. In a letter to his brother, he stated, "The Supreme Court of the U. States is now in session and ha[ve] done no other business than admitting a few Counsellors and making a few rules."[15]

One of the new Court's rules irked the young Clinton:

> One of their orders "that all process shall run in the name of the President" tho' apparently unimportant smells strongly of monarchy—You know that in G. Britain some writs are prefaced with "George the 3d by the Grace of God & c." A federal process beginning with "George Washington by the grace of God & c." will make the American President as important in Law forms as the British King.[16]

Despite the early Court's lack of business, Justice Iredell could still say when he was appointed, "The duty will be severe."[17] That was true because of the arduous duty of serving in the circuit courts. The 1789 Judiciary Act placed on the members of the highest Court the obligation of personally sitting on the circuit courts that had been set up on a territorial basis throughout the country. At a time when travel was so difficult, the imposition upon the Supreme Court Justices of this circuit duty was most burdensome. In February 1792, Justice Cushing complained in a letter to Washington about the hardships involved in his judicial travels: "The travelling is difficult this Season:—I left Boston, the 13th of Jan in a Phaeton, in which I made out to reach Middleton as the Snow of the 18th began, which fell so deep there as to oblige me to take a Slay, & now again wheels seem necessary."[18]

The situation with regard to one Justice was graphically described in a 1798 letter by Samuel Chase, who had been appointed to the Court two years earlier. He would, Chase wrote,

> shew the very great burthen imposed on one of the Judges Mr. Iredell lives at Edenton, in North Carolina. When he is appointed to attend the Middle Circuit, he holds the Circuit Court for New Jersey at Trenton, on 1st of April; and, at Philadelphia, on the 11th of the same month; he then passes through the State of Delaware (by Annapolis) to hold the Court, on 22nd of May, at Richmond, in Virginia (267 miles.); from thence he must return, the same distance to hold Circuit Court on 27th June, at New Castle in Delaware. . . . A permanent system should not impose such hardship on any officer of Government.[19]

"I will venture to say," Iredell himself wrote in 1791, "no Judge can conscientiously undertake to ride the Southern Circuit constantly, and perform the other parts of his duty. . . . I rode upon the last Circuit 1900 miles: the distance from here and back again is 1800."[20]

When Jay resigned as Chief Justice, one of the reasons, according to a letter from a Congressman, was "the system of making the Judges of the Supreme Court ride the Circuits throughout the Union; this has induced Mr. Jay to quit the Bench; he was Seven months in the Year from his family travelling about the Country."[21] In a letter the previous year, Jay had expressed resentment at being "placed in an office . . . which takes me from my Family half the Year, and obliges me to pass too considerable a part of my Time on the Road, in Lodging Houses, & Inns."[22]

Thomas Johnson of Maryland, who had been appointed to Justice Rutledge's seat in 1791, actually resigned a year later because of the burden of circuit duty. "I cannot resolve," Johnson wrote in his resignation letter, "to spend six Months in the Year of the few I may have left from my Family on Roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed: My Time of Life Temper and other Circumstances forbid it."[23]

Finally, the Justices themselves publicly complained about what they termed, in a 1792 letter to Washington, "the burdens laid upon us so excessive that we cannot forbear representing them in strong and explicit terms."[24] At the same time, they wrote a remonstrance to Congress which declared, "That the task of holding twenty seven circuit Courts a year, in the different States, from New Hampshire to Georgia, besides two Sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which considering the extent of the United States, and the small number of judges, is too burthensome."[25]

In addition, the remonstrance urged the unfairness of a system in which the Justices sat on appeals from decisions which they had made on circuit: "That the distinction made between the Supreme Court and its Judges, and appointing the same men finally to correct in one capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice, and to that confidence in the supreme Court, which it is so essential to the public Interest should be reposed in it."[26]

Though the Justices asked "that the system may be so modified as that they may be relieved from their present painful and improper situation."[27] Congress gave them only what has been called "but a half loaf and a meagre one at that."[28] A 1793 statute dispensed with the attendance of more than one Supreme Court Justice at each Circuit Court. This, wrote Justice Cushing, "eases off near half the difficulty. . . . The Justices are now impowered, at each Session of the Supreme Court, to assign a Circuit to a Single Judge, so that a Judge need go but one Circuit in a Year." But that was all Congress was prepared to do. It did not make what Cushing called the "radical alteration of the present Itinerant System for the better," for which the Justices had hoped. In fact, a law which, in Cushing's phrase, "may take off the fatigues of travelling & the inconvenience of so much absence from home"[29] would not take effect for another century.

Early Decisions

One of the reasons why Congress was unwilling, despite the Justices' remonstrance, to relieve them of circuit duties, was the fact that the Supreme Court itself had little work to do. As her son Thomas wrote in a 1799 letter to Abigail Adams, "The Supreme Court of the United States adjourned this day—Little business was done, because there was little to do."[30] During its first decade, the Supreme Court decided relatively few cases. In the first three years of its existence, in fact, the Court had practically no business to transact; it was not until February 1793 that the Justices decided their first case.

A half year earlier, on August 11, 1792, the Justices had delivered their first opinions in *Georgia v. Brailsford*.[31] The Justices adopted the English practice of delivering their opinions seriatim—a practice which they followed until John Marshall's day. Interestingly, in this first case in which opinions were delivered, the first opinion was a dissent by Justice Johnson, thus establishing at the outset the right of Justices to express publicly their disagreement with the result reached by the Court.

Brailsford granted Georgia a temporary injunction. The decision was described by Edmund Randolph in a letter to Madison which contained an unflattering picture of the first Court:

> The State of Georgia applied for an injunction to stop in the Marshal's hands a sum of money which had been recovered in the last circuit court by a British subject, whose estate had been confiscated. It was granted with a demonstration to me of these facts; that the premier [Jay] aimed at the cultivation of Southern popularity; that the professor [Wilson] knows not an iota of equity; that the North Carolinian [Iredell] repented of the first ebullitions of a warm temper; and that it will take a score of years to settle, with such a mixture of judges, a regular course of chancery.[32]

The first important decision of the Supreme Court was that rendered in February 1793 in *Chisholm v. Georgia*.[33] Chisholm was a citizen of South Carolina and his suit was based upon a claim for the delivery of goods to the state for which no payment had been received. Counsel for Georgia appeared and presented a written remonstrance denying the Court's jurisdiction, "but, in consequence of positive instructions, they declined taking any part in arguing the question." The case was then argued by Randolph, who represented Chisholm. (It was common at the time for the Attorney General to represent private clients; indeed, Randolph's official salary was so small that he depended for his livelihood upon such private clients.)

"This great cause,"[34] as the first *Chisholm* opinion (that by Justice Iredell) characterized it, presented the crucial issue of whether a state could be sued in a federal court by citizens of another state. The Court's answer was given unequivocally in favor of its jurisdiction in such a case in opinions by Justices Blair, Wilson, and Cushing and Chief Justice Jay (Justice Iredell alone dissenting). The most important opinion was delivered by

Justice Wilson. Unfortunately, it suffers from the pedantry and exaggerated rhetoric present in all of Wilson's writing—these defects, as much as his delivery of law lectures at the College of Philadelphia, led to his sobriquet of "the professor," as seen in the quoted Randolph letter. With all its faults, however, the Wilson *Chisholm* opinion remains a powerful justification both of the Court's decision and of the United States as a nation, not merely a league of sovereign states.

Wilson's opinion resoundingly rejected the state assertion of immunity from suit. After going into his conception of a state as a "body of free persons united together for their common benefit," Wilson asked, "Is there any part of this description, which intimates in the remotest manner, that a state, any more than the men who compose it, ought not to do justice and fulfil engagements?" Wilson declared that if a free individual is amenable to the courts, the same should be true of the state. "If the dignity of each singly, is undiminished, the dignity of all jointly must be unimpaired." States are subject to the same rules of morality as individuals. If a dishonest state willfully refuses to perform a contract, should it be permitted "to insult . . . justice" by being permitted to declare, "I am a sovereign state"?[35]

In *Chisholm,* Wilson recognized that though the immediate issue of state subjection to suit was important, it was outweighed by one "more important still; and . . . no less radical than this—'do the people of the United States form a nation?'" Wilson's opinion answered this question with a categorical affirmative. In *Chisholm,* he repudiated the concept of state sovereignty in language as strong as that later delivered by Chief Justice Marshall himself. Sovereignty, he asserted, is not to be found in the states, but in the people. The Constitution was made by the "People of the United States," who did not surrender any sovereign power to the states. "As to the purposes of the union, therefore, Georgia is not a sovereign state."[36]

The people, Wilson concluded, intended to set up a nation for national purposes. They never intended to exempt the states from national jurisdiction. Instead, they provided expressly, "The judicial power of the United States shall extend to controversies, between a state and citizens of another state." Wilson asked, "[C]ould this strict and appropriated language, describe, with more precise accuracy, the cause now depending before the tribunal?"[37]

The *Chisholm* decision, we are told, "fell upon the country with a profound shock."[38] Indeed, it led to such a furor in the states that the Eleventh Amendment (prohibiting suits by individuals against states) was at once proposed and adopted. Though the immediate holding in *Chisholm v. Georgia* was thus overruled, the Court's reasoning there remains of basic importance for what it tells us about the nature of the Union. To decide the case, the Court really had to determine the crucial issue of state sovereignty. If Georgia was intended to be a sovereign state under the Constitution, it could not be sued. In deciding that Georgia was subject to suit, the Court was rejecting the claim that the state was vested with the traits of

sovereignty. "As to the purposes of the Union," to repeat the declaration of Justice Wilson, "Georgia is not a sovereign state."

Judicial Review

It is, of course, known to even the beginner in constitutional history that the power of the Supreme Court to review the constitutionality of acts of Congress was established by Chief Justice Marshall's landmark opinion in *Marbury v. Madison.*[39] Yet even Marshall—legal colossus though he was—did not write on a blank slate. On the contrary, the law laid down by Marshall in *Marbury v. Madison* was inextricably woven with that expounded by his contemporaries and predecessors. Judicial review, as an essential element of the law, was part of the legal tradition of the time, derived from both the colonial and revolutionary experience. With the appearance during the Revolution of written constitutions, the review power began to be stated in modern terms. Between the Revolution and *Marbury v. Madison,* state courts asserted or exercised the power in at least twenty cases.[40] Soon after the Constitution went into effect, assertions of review authority were made by a number of federal judges.[41]

Even more important, the Supreme Court began to lay the foundation for judicial review soon after it went into operation. Of particular significance in this respect were three cases decided during the 1790s. The first was *Ware v. Hylton.*[42] A 1777 Virginia law decreed the confiscation of all debts owed to British subjects. Despite it, an action was brought on a debt due before the Revolution from an American to a British subject. Plaintiff relied upon the Treaty of Peace with Britain under which "creditors, on either side, shall meet with no lawful impediment to the recovery of the full value of all *bona fide* debts, heretofore contracted."

A letter from Justice Iredell to his wife called the case "the great Virginia cause."[43] John Marshall argued in favor of the Virginia law and maintained that "the judicial authority can have no right to question the validity of a law; unless such a jurisdiction is expressly given by the constitution."[44] As Marshall's biographer notes, "It is an example of the 'irony of fate' that in this historic legal contest Marshall supported the theory which he had opposed throughout his public career thus far, and to demolish which his entire after life was given."[45] Had Marshall's *Ware v. Hylton* assertion prevailed, the American system of constitutional law would have developed along lines altogether different from the course taken.

The Court, however, rejected Marshall's argument and ruled that the Treaty of Peace with Britain overrode conflicting provisions of state law on the debts owed by Americans to British subjects. "A treaty cannot be the supreme law of the land," declared Justice Chase, "if any act of a state Legislature can stand in its way. . . . It is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide."[46]

Ware v. Hylton asserted review power over a state law. A similar power was exercised in *Calder v. Bull,*[47] where a Connecticut law that set aside a probate decree disapproving a will and granting a new trial was attacked as a violation of the Ex Post Facto Clause. The Court held that the law was not an ex post facto law, since the Ex Post Facto Clause reaches only laws that are criminal in nature; the constitutional prohibition, in Justice Iredell's words, "extends to criminal, not to civil cases."[48]

The opinions delivered, nevertheless, left no doubt of the Court's power to strike down the state law, if it had been found to violate the Constitution. "I cannot," declared Justice Chase, "subscribe to the omnipotence of a state Legislature or that it is absolute and without control. . . . An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."[49]

In his opinion, Justice Chase stated that he was not "giving an opinion, at this time, whether this court has jurisdiction to decide that any law made by Congress, contrary to the Constitution of the United States, is void."[50] It was not, to be sure, until *Marbury v. Madison* that the Court came down categorically in favor of such a review power. It was, however, in *Hylton v. United States,*[51] almost a decade before Marshall's classic *Marbury* opinion, that the Court first ruled on the constitutionality of a federal law.

Hylton arose under article I, section 9: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This means that direct taxes must be apportioned among the states on the basis of their respective populations. Yet this does not tell us what is a "direct tax" within the constitutional provision. During the Framers' Convention, "Mr. King asked what was the precise meaning of *direct* taxation? No one answered."[52]

In *Hylton v. United States,* it was argued that a fixed federal tax on all carriages used for the conveyance of persons was a direct tax and hence invalid, because it was not apportioned among the states according to population. The Court unanimously held that the tax at issue was not a direct tax within the meaning of article I, section 9. According to the opinions rendered, since the Direct-Tax Clause constitutes an exception to the general taxing power of Congress, it should be strictly construed. No tax should be considered "direct" unless it could be conveniently apportioned. "As all direct taxes must be apportioned," said Justice Iredell, "it is evident, that the constitution contemplated none as direct, but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the constitution. That this tax cannot be apportioned is evident."[53]

Justice Paterson, himself one of the Framers, who had been appointed to the Court after Justice Johnson resigned, stated that the constitutional provision on direct taxes had been intended to allay the fears of the southern states lest their slaves and lands be subjected to special taxes not equally

apportioned among the northern states.[54] From this, it was a natural step to the view, expressed by all the Justices, that the "direct taxes contemplated by the constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession or any other circumstance; and a tax on land."[55]

More important than the *Hylton* holding is the fact that the case was the first in which an act of Congress was reviewed by the Supreme Court. It is true that Justice Chase stated that "it is unnecessary, at this time, for me to determine, whether this court constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the constitution."[56] But the mere fact that the Justices considered the claim that the federal statute was "unconstitutional and void"[57] indicates that they believed that the Court did possess the review power. As such, *Hylton* was an important step on the road to *Marbury v. Madison.*

What the Court Does Not Do

Justice Louis D. Brandeis used to say that what the Supreme Court did not do was often more important than what it did do.[58] The fact that the highest tribunal acts as a law court has been more important than any other factor in determining the things that it does not do in our constitutional system. The Framers deliberately withheld from the Supreme Court power that was purely political in form, such as a forthright power to veto or revise legislation. Instead, they delegated to the Court "The judicial Power" alone—a power which, by the express language of article III, extends only to the resolution of "Cases" and "Controversies." This, Justice Robert H. Jackson once noted,[59] is the most significant and the least comprehended limitation upon the way in which the Court can act. Judicial power, the Court pointed out in 1911, "is the right to determine actual controversies arising between adverse litigants, duly instituted in the courts of proper jurisdiction."[60] The result of the constitutional restriction is that the Court's only power is to decide lawsuits between opposing litigants with real interests at stake, and its only method of proceeding is by the conventional judicial process. "The Court from the outset," says Chief Justice Charles Evans Hughes, "has confined itself to its judicial duty of deciding actual cases."[61]

Of course, in a system such as ours, where the highest Court plays so prominent a political role, there might be great advantages in knowing at once the legal powers of the Government. It would certainly be convenient for the parties and the public to know promptly whether a particular statute is valid. The desire to secure these advantages led to strong efforts at the Constitutional Convention to associate the Supreme Court as a Council of Revision in the legislative process; but these attempts failed and, ever since, it has been deemed, both by the Court itself and by most students of

its work, that the disadvantages of such a political role by the judiciary were far greater than its advantages.

Similarly, from the beginning, the Court has rejected the notion that it could avoid the difficulties inherent in long-delayed judicial invalidation of legislation by an advisory opinion procedure. The very first Court felt constrained to withhold even from the "Father of his Country" an advisory opinion on questions regarding which Washington was most anxious to have illumination from the highest tribunal.[62] In 1793 President Washington, through a letter sent to the Justices by Secretary of State Jefferson, sought the advice of the Supreme Court on a series of troublesome "abstract questions" in the realm of international law "which have already occurred, or may soon occur." Chief Justice Jay and his associates first postponed their answer until the sitting of the Court and then, three weeks later, replied politely but firmly, declining to give the requested answers.

According to the Justices' letter to Washington, both "the lines of separation drawn by the Constitution between the three departments of the government . . . and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to."[63] This, says Chief Justice Hughes, was a statement that the Court "considered it improper to declare opinions on questions not growing out of a case before it."[64]

The Justices' refusal has served as a precedent against the giving of advisory opinions by the Court. Ever since that time, it has, in Chief Justice Harlan F. Stone's phrase, been the Court's "considered practice not to decide abstract, hypothetical or contingent questions."[65] A party cannot, in other words, bring an action for what Justice Oliver Wendell Holmes once called a "mere declaration in the air";[66] on the contrary, "A case or controversy in the sense of a litigation ripe and right for constitutional adjudication by this Court implies a real contest—an active clash of views, based upon an adequate formulation of issues, so as to bring a challenge to that which Congress has enacted inescapably before the Court."[67]

A few years earlier, in *Hayburn's Case,*[68] the Justices had decided that they might not, as judges, render decisions that were subject to revision by some other body or officer. They gave effect to this view even though it meant the effective nullification of a federal statute providing for veterans' pensions.

The statute, passed by Congress in 1792, authorized the federal circuit courts to determine the pension claims of invalid veterans of the Revolution and certify their opinions to the Secretary of War, who might then grant or deny the pensions as he saw fit. *Hayburn's Case* was argued in the Supreme Court, but that tribunal never rendered decision, for Congress intervened by providing another procedure for the relief of the pensioners.[69] But the statute at issue was considered in the different circuit courts and their opinions are given in a note to *Hayburn's Case* by the reporter.

All of the circuit courts (with five of the six Justices sitting) concurred in the holding that they could not validly execute the statute as courts set up under article III. The strongest position was taken by Justices Wilson and Blair sitting in the Pennsylvania Circuit Court. In Chief Justice Taney's words, they "refused to execute [the statute] altogether."[70] They entered an order in a case involving Hayburn as the invalid claimant: "[I]t is considered by the Court that the same be not proceeded upon."[71] Then they sent a letter to the President, undoubtedly drafted by Justice Wilson, which gave the reasons for their action. It asserted that "the business directed by this act is not of a judicial nature." For the court to act under the law would mean that it "proceeded *without* constitutional authority."[72]

That was true, "Because, if, upon the business, the court had proceeded, its *judgments* . . . might, under the same act, have been revised and controuled . . . by an officer in the executive department. Such revision and controul we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States."[73]

After Hayburn presented a memorial petitioning Congress for relief, Congressman Elias Boudinot explained the action to the House of Representatives:

> It appeared that the Court . . . looked on the law . . . as an unconstitutional one; inasmuch as it directs the Secretary of War to state the mistakes of the Judge to Congress for their revision; they could not, therefore, accede to a regulation tending to render the Judiciary subject to the Legislative and Executive powers, which, from a regard for liberty and the Constitution, ought to be kept carefully distinct, it being a primary principle of the utmost importance that no decision of the Judiciary Department should under any pretext be brought in revision before either the Legislative or Executive Departments of the government, neither of which have, in any instance, a revisionary authority over the judicial proceedings of the Courts of Justice.[74]

According to Chief Justice Taney, *Hayburn's Case* established that the power conferred upon the federal courts by the 1792 statute "was no judicial power within the meaning of the Constitution, and was, therefore, unconstitutional and could not lawfully be exercised by the courts."[75] Since *Hayburn's Case,* it has been settled that the federal judges may not act in cases where their judgments are subject to revision by the executive or legislative department. The alternative is what District Judge Peters, who sat with Justices Wilson and Blair in the circuit court, termed "the danger of Executive control over the judgments of Courts"[76]—something avoided by the judges' strong stand in *Hayburn's Case.*

The judges' action in *Hayburn's Case* was also an important step on the road to *Marbury v. Madison.* This, said Boudinot in his statement to the House, was "the first instance in which a Court of Justice had declared a law of Congress to be unconstitutional."[77] It was widely recognized that the action of the judges was one, in the phrase of a newspaper, "declaring

an act of the present session of Congress, unconstitutional."[78] Writing to Henry Lee, Madison referred to the review power and said that the judges' "pronouncing a law providing for Invalid Pensioners unconstitutional and void" was "an evidence of its existence."[79] At any rate, cases such as *Hayburn's Case* as well as those discussed in the last section were early recognitions of the judicial possession of the review power.

Chief Justices Rutledge and Ellsworth

The first national capital was New York and, as seen, the Supreme Court first met in that city early in 1790. A year later, in February 1791, after the seat of government had moved to Philadelphia, the Court held its sessions there, first in the State House and then in the new City Hall just east of Independence Hall, where both the Supreme Court and the state and city courts sat.

There were significant personnel changes while the Court sat in Philadelphia. As already seen, Thomas Johnson of Maryland was appointed in place of John Rutledge, who had resigned in 1791 to become Chief Justice of the South Carolina Court of Common Pleas. Johnson, however, resigned a year later because he found the circuit duties too strenuous, and his seat was filled by William Paterson, one of the Framers, who was then Governor of New Jersey. Samuel Chase of Maryland was elevated to the Court in 1796 in place of Justice Blair, who had resigned because of ill health. Then, when James Wilson died in 1798, President Adams selected Bushrod Washington, the first President's nephew, who had become a leader of the Virginia Bar. Justice Washington was to serve for thirty-two years as one of the pillars of the Marshall Court. Mention should also be made of the appointment in 1799 of Alfred Moore, a North Carolina judge, to fill the vacancy caused by the death of Justice Iredell.

Even more important were the personnel changes that occurred in the Chief Justiceship. John Jay is, of course, one of the leading names in early American history. He was not, however, a success as the head of the Supreme Court. In part this was due to the lack of business in the early Court, as well as the burden of circuit duty. One must conclude, as Edmund Randolph did in a 1792 letter to Madison, that Jay may have been "clear . . . in the expression of his ideas, but . . . they do not abound in legal subjects."[80]

Jay also set a bad example in the early Court by indicating that he did not consider his judicial position all that important. In 1794, Jay accepted an appointment as Special Ambassador to England, where he negotiated the treaty that bears his name. Though his appointment was denounced as a violation of the separation of powers, Jay did not resign as Chief Justice while carrying out his diplomatic assignment. Jay's successor, Oliver Ellsworth, also served as Minister to France without resigning as Chief Justice. These extrajudicial appointments had an inevitable negative effect upon the prestige of the fledgling Court. "That the *Chief Justiceship* is a

sinecure," wrote the *Philadelphia Aurora,* "needs no other evidence, than that in one case the duties were *discharged* by one person who resided at the same time in England; and by another during a year's residence in France."[81]

While he was absent in England, Jay was nominated for Governor of New York and elected to that office soon after his return in 1795. He resigned as Chief Justice to accept the Governorship. A striking indication of the relative importance of the two positions at the time is given in the characterization by a New York newspaper of Jay's new office as a "promotion."[82]

President Washington had difficulty in filling the Chief Justiceship. John Rutledge, who had resigned from the Court to become Chief Justice of the South Carolina Court of Common Pleas, wrote to Washington that he was now willing to be Jay's successor. The President gave him a recess appointment, and Rutledge sat as Chief Justice during the August 1795 Term. However, the Senate voted against his confirmation, both because of his vitriolic attack upon the Jay Treaty in a Charleston speech and rumors of what John Adams called his "accellerated and increased . . . Disorder of the Mind."[83]

Washington next nominated Justice Cushing, the Senate confirmed the nomination, and Cushing actually received his commission. But then, as summarized by Adams in a letter to his wife, "Judge Cushing declines the Place of Chief-Justice on Account of his Age and declining Health."[84] Another indication of the contemporary reputation of the highest judicial position is seen in the comment of a Rhode Island official, "It is generally thought that Neighbor Cushing gave a Clear proof of his Understanding when he refused the Chief Justiceship."[85]

The President then chose Oliver Ellsworth of Connecticut, who had been a member of the Continental Congress, a state judge, and a Senator. He had been an important participant in the Framers' Convention, as well as a leader in the ratification struggle. As Senator he had been the principal author of the Judiciary Act of 1789.

The Ellsworth appointment met with general approval. "The appointment of the C.J.," Adams wrote to his wife, "was a wise Measure," even though, by it, "we loose the clearest head and most diligent hand we had [in the Senate]."[86] Senator Jonathan Trumbull agreed in a letter to his brother John, a famous painter, that Ellsworth's appointment was "a great Loss this to the Senate!" At the same time, he wrote, it was "a valuable acquisition to the Court—an acquisition which has been much needed."[87]

The leading history of the early Court states that Ellsworth was the first to make the position of Chief Justice a place of leadership.[88] His tenure was, however, too short for him to establish a true leadership role. About the only sign of the Justices' following Ellsworth's lead was the indication in the reported cases that his predilection for brief opinions was not without effect.[89]

Chief Justice Ellsworth's most important opinion (about the only sig-

nificant one he delivered on the Supreme Court) laid down a basic rule on the Court's own jurisdiction. The case was *Wiscart v. D'Auchy,*[90] decided in 1796. The question at issue was whether an equity decree was reviewable in the Supreme Court by a writ of error or an appeal. In the course of the case, the Court considered the nature of its appellate jurisdiction. Chief Justice Ellsworth, in an oft-cited passage, declared that the Court's appellate jurisdiction depended entirely upon statute: "If Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it."[91] Therefore, said Ellsworth, the only question in determining whether the Supreme Court has appellate jurisdiction in a given case is whether Congress has established a rule regulating its exercise in such a case.

The Ellsworth view on the matter was rejected by Justice Wilson, who urged, in a dissenting opinion, that the Supreme Court's appellate jurisdiction was derived from the Constitution: "The appellate jurisdiction, therefore, flowed, as a consequence, from this source; nor had the legislature any occasion to do, what the constitution had already done."[92] Even in the absence of congressional provision, therefore, according to Wilson, the appellate jurisdiction of the Supreme Court may be exercised, resting as it does upon the strong ground of the Constitution itself.

Interestingly enough, both Ellsworth and Wilson had been prominent members of the Framers' Convention. Yet less than a decade after the basic document was drafted, they disagreed sharply on the organic nature of the appellate jurisdiction of the nation's highest tribunal. Subsequent cases confirm the correctness of Chief Justice Ellsworth's view. "By the constitution of the United States," declared the Court in 1847, "the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress."[93] Two decades later, the Court was, if anything, even more blunt, asserting, "In order to create such appellate jurisdiction in any case, two things must concur: the Constitution must give the capacity to take it and an act of Congress must supply the requisite authority." The Supreme Court's appellate jurisdiction is thus "wholly the creature of legislation."[94]

His *Wiscart v. D'Auchy* opinion shows both Chief Justice Ellsworth's legal ability and his potential for molding our public law. But he was able to sit in the court's center chair for less than four years, and during much of that time he was absent because of illness. As a 1798 letter from his brother to Oliver Wolcott, Jr., characterized it, "Mr. Ellsworth . . . is considerably unwell, and I understand quite hypocondriac."[95]

During Ellsworth's last year as Chief Justice, he served as special envoy in France. The Court could barely function during that period. At its August 1800 Term, the last in Philadelphia, not only was Ellsworth absent, but also absent were Justice Cushing, who was ill, and Justice Chase, who was in Maryland working for President Adams's reelection. This led to bitter anti-Federalist attacks, such as that in the *Aurora* which condemned "[t]he suspension of the highest court of judicature in the United States, to

allow a *Chief Justice* to add NINE THOUSAND DOLLARS a year to his salary, and to permit Chase to make electioneering harangues in favor of Mr. *Adams.*"[96] Even Adams's son wrote to his cousin that Chase was "too much engaged in Electioneering."[97]

Not in the best of condition when appointed, Ellsworth's health completely broke down on his journey to France. The Chief Justice described his condition in a letter sent from Le Havre to Wolcott: "Sufferings at sea, and by a winter's journey thro' Spain, gave me an obstinate gravel, which by wounding the kidnies, has drawn & fixed my wandering gout to those parts. My pains are constant, and at times excruciating."[98] On the same day, October 16, 1800, Ellsworth sent to President Adams a letter resigning the office of Chief Justice.

Judiciary Act of 1801

Circuit duty, we have seen, was the great albatross of the early Supreme Court. It is true that the problem of the Supreme Court Justices sitting on circuit was resolved by the Judiciary Act of 1801. That law provided for the creation of six new Circuit Courts to be staffed entirely by newly appointed judges. Unfortunately, however, the new statute was an integral part of the controversy between the Federalists and the Jeffersonians that dominated the political scene at the turn of the century. The desirable reform of relieving Supreme Court members of their circuit duties was less important than the creation by the lame-duck Federalist Congress of a whole new court system, with vacancies in the new tribunals to be filled by deserving members of the defeated party. The bill was enacted into law on February 13, 1801; within two weeks President Adams had filled the new positions with Federalists; and by March 2 (two days before Jefferson took office) the Senate had confirmed the appointments. The new judges, many of whose commissions were actually filled out on the last day of Adams's term of office, were derisively known as the "midnight judges."

The newly elected Jeffersonians greeted the 1801 statute with indignation. They could scarcely concur in the Federalist attempt to entrench themselves in the life-tenure judiciary by the Midnight Judges Bill. Instead, the Jeffersonian Congress did away with what they called the "army of judges" by abolishing the new courts soon after Jefferson took office, without making any provision for the displaced judges. They did so by a simple Act of March 8, 1802, repealing the 1801 Judiciary Act and providing for the revival of the former circuit court system.

Lost in the partisan controversy was the desirable reform effected by the 1801 act in relieving Supreme Court Justices of circuit court duty. Instead, the obligation of sitting on the circuits continued as a burden upon the members of the highest bench. It was only after that burden was finally removed in 1891 that the Supreme Court was able fully to assert its role as guardian of the constitutional system. Though judicial review was

established in 1803, it did not really become an important practical factor in the polity until the 1890s.

The Federalists themselves bitterly attacked the 1802 repealing statute as one which, in Gouverneur Morris's characterization, "renders the judicial system manifestly defective and hazards the existence of the Constitution."[99] The Federalist argument was, however, rejected by the Supreme Court in *Stuart v. Laird,*[100] in a laconic opinion which stated only that Congress had constitutional authority to establish, as the members chose, such inferior tribunals as they deemed proper, and to transfer a cause from one such tribunal to another. "In this last particular," said the Court, "there are no words in the constitution to prohibit or restrain the exercise of legislative power."[101]

2

Marshall Court, 1801–1836

On the north and south walls of the Supreme Court Chamber in Washington are carved two marble panels depicting processions of historical lawgivers. Of the eighteen figures on the panels only one is there because of his work as a judge, and he is the one American represented: John Marshall. This is more than mere coincidence, for it sharply illustrates a basic difference between the making of law in the United States and in other countries. The great lawgivers in other systems have been mighty monarchs of the type of Hammurabi and Justinian, divinely inspired prophets like Moses, philosophers such as Confucius, or scholars like Hugo Grotius and Sir William Blackstone. We in the United States have certainly had our share of the last two types of lawgiver—particularly among the men who drew up the organic documents upon which our polity is based. Significantly enough, however, it is not a Jefferson or a Madison who is depicted as *the* American lawgiver, but the great Chief Justice who, more than any one person, has left his imprint upon the development of our constitutional law.

Marshall's Appointment

In the autumn of 1800, not long before Marshall's appointment as Chief Justice, the United States Government moved to Washington, D.C. The new capital was still in the early stages of construction and except for the north wing of the Capitol and the still unfinished White House, there was, as a Congressman wrote, "nothing to admire but the beauties of nature."[1]

At least buildings had been erected for the Legislature and Executive. The same was not true of the Judiciary. When the Federal City was planned, the Supreme Court was completely overlooked and no chamber provided for it: "When the seat of government was transferred to Washington, the court crept into an humble apartment"[2] in what had been designed as a House Committee room.

The failure to provide adequate housing for the Supreme Court "provides further evidence that the Court was not regarded as an institution of great importance in the federal system."[3] Indeed, the outstanding aspect of the Court's work during its first decade was its relative unimportance. When Marshall came to the central judicial chair in 1801, the Court was but a shadow of what it has since become. When he died in 1836, it had been transformed into the head of a fully coordinate department, endowed with the ultimate authority of safeguarding the ark of the Constitution.

Marshall it was who gave to the Constitution the impress of his own mind, and the form of our constitutional law is still what it is because he shaped it.[4] "Marshall," declared John Quincy Adams at news of his death, "by the ascendancy of his genius, by the amenity of his deportment, and by the imperturbable command of his temper, has given permanent and systematic character to the decisions of the Court, and settled many great constitutional questions favorably to the continuance of the Union." It was under Marshall's leadership that the Supreme Court transmuted the federal structure created by the Founders into a nation strong enough to withstand even the shock of civil war. To quote Adams's not unbiased view again, "Marshall has cemented the Union which the crafty and quixotic democracy of Jefferson had a perpetual tendency to dissolve."[5]

Marshall's appointment as Chief Justice was one of the happy accidents that change the course of history. In the first place, had Justice Cushing not declined the appointment or had Chief Justice Ellsworth not made the arduous journey to France, there would have been no vacancy in the Chief Justiceship until well after President Adams's term had expired. After Chief Justice Ellsworth's resignation, the President offered his place to John Jay. The Senate confirmed the appointment and, had Jay accepted, there would, of course, still have been no place for Marshall on the Court. Jay, however, also refused the position both because he wanted to retire to his farm in Bedford, New York, and because his acceptance in "a System so defective would give some Countenance to the neglect and Indifference with which the opinions and Remonstrances of the Judges on this important Subject have been treated."[6]

After Jay declined the Chief Justiceship, it was widely expected that the President would nominate Justice Paterson. Marshall later wrote, "On the resignation of Chief Justice Ellsworth I recommended Judge Patteson [*sic*] as his successor."[7] Adams, however, refused to select him. According to Marshall, "The President objected to him, and assigned as his ground of objection that the feelings of Judge Cushing would be wounded by passing him and selecting a junior member of the bench."[8] The real reason for

Adams's refusal, however, was that, as a letter to Hamilton stated, "Either Judge Paterson or General Pinckney ought to have been appointed, but both those worthies are your friends."[9] Adams was unwilling to consider any person in the Hamiltonian faction of his party.

Marshall himself tells us what happened next: "When I waited on the President with Mr. Jays letter declining the appointment he said thoughtfully 'Who shall I nominate now'? I replied that I could not tell, as I supposed that his objection to Judge Paterson remained. He said in a decided tone 'I shall not nominate him.' After a moments hesitation he said, 'I believe I must nominate you'. . . . Next day I was nominated."[10]

The Marshall appointment was both completely unexpected and resented by Adams's own party, which believed that Judge Paterson should have been given the position. "With grief, astonishment & almost indignation," Jonathan Dayton, a Federalist Senator, wrote to Judge Paterson, "I hasten to inform you, that, contrary to the hopes and expectations of us all, the President has this morning nominated Gen. Marshall. . . . The eyes of all parties had been turned upon you, whose pretensions he knew were, in every respect the best, & who, he could not be ignorant, would have been the most acceptable to our country."[11]

The feeling in the Senate against the nomination was so strong, Dayton went on, that "I am convinced . . . that they would do it [i.e., reject the nomination] if they could be assured that thereby *you* would be called to fill it." The Senate suspended the nomination for a week, but finding the President inflexibly opposed to Paterson and fearing, in Dayton's words, "that the rejection of this might induce the nomination of some other character more improper, and more disgusting,"[12] the Senate yielded and unanimously confirmed Marshall's appointment.

Judge Paterson had not wanted to be Chief Justice and went out of his way to praise the Marshall appointment. "Mr. Marshall," Paterson replied to Dayton, "is a man of genius, of strong reasoning powers, and a sound, correct lawyer. His talents have at once the lustre and solidity of gold."[13] Paterson wrote to Marshall to the same effect in congratulating him on his appointment,[14] and, Marshall writes, "I felt truly grateful for the real cordiality towards me"[15] displayed by his new colleague.

Some time before Marshall's appointment, James Kent heard some friends of Hamilton say that Hamilton was in "every way, suited" to be Chief Justice. Kent, writing to Hamilton's wife about the incident, affirmed, "Of all this there could be no doubt." But, Kent concluded, Hamilton's "versatile talents, adapted equally for the bench & the bar, the field, the Senate house & the Executive cabinet, were fortunately called to act in a more complicated, busy & responsible Station."[16]

This estimate by the man who, next to Marshall, was then the nation's preeminent jurist, is still another indication of the low state of the early Supreme Court. All this, however, was to change after Marshall became Chief Justice. It was Marshall who established the role of the Supreme Court as the authoritative expounder of the Constitution, and it was he

who exercised this role to lay the legal foundations of a strong nation, endowed with all the authority needed to enable it to govern effectively.

Marshall's Background

On the morning of Jefferson's first inauguration, Marshall wrote to Charles C. Pinckney, "Of the importance of the judiciary at all times but more especially the present I am very fully impressed & I shall endeavor in the new office to which I am called not to disappoint my friends."[17] Certainly, Marshall as Chief Justice was anything but a disappointment to his "friends." Years after John Adams had nominated Marshall to be Chief Justice, he said, "My gift of John Marshall to the people of the United States was the proudest act of my life. . . . I have given to my country . . . a Hale, a Holt, or a Mansfield."[18]

Almost two centuries later, no one doubts Marshall's preeminence in our law. "If American law," says Justice Oliver Wendell Holmes, "were to be represented by a single figure, skeptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall."[19] Marshall's was the task of translating the constitutional framework into the reality of decided cases. He was not merely the expounder of our constitutional law; he was its author, its creator. "Marshall found the Constitution paper and he made it power," said James A. Garfield. "He found a skeleton, and he clothed it with flesh and blood."[20] What Justice Story termed "the extraordinary judgments of Mr. Chief Justice Marshall upon constitutional law"[21] laid the foundation of our constitutional edifice. Ever since, that structure has been associated with the Marshall name and has remained the base upon which the American polity functions.

If we look to the background of the man himself, however, he certainly seemed ill equipped for the task to which he was ultimately called. One who reads the modest account of his early life in his famous autobiographical letter to Joseph Story is bound to be amazed at the meagerness of his education and training, both generally and in the law itself. His only formal schooling consisted of a year under the tuition of a clergyman, as well as another under a tutor who resided with his family. For the rest, his learning was under the superintendence of his father, who, Marshall concedes, "had received a very limited education."[22]

His study for the Bar was equally rudimentary. During the winter of 1779–1780, while on leave from the Army, "I availed myself of this inactive interval for attending a course of law lectures given by Mr. Wythe, and of lectures of Natural philosophy given by Mr. Madison then President of William and Mary College."[23] He attended law lectures for less than three months[24]—a time so short, according to his leading biographer, that, in the opinion of the students, "those who finish this study [of law] in a few months, either have strong natural parts or else they know little about it."[25] We may doubt, indeed, whether Marshall was prepared even to take full advantage of so short a law course. He had just fallen in love with his wife-

to-be, and his notebook (which is preserved) indicates that his thoughts were at least as much upon his sweetheart as upon the lecturer's wisdom.[26]

Shakespeare, according to Alfred North Whitehead, wrote better poetry for not knowing too much. It may appear paradoxical to make the same assertion with regard to the greatest of American judges, for judicial ability normally depends, in large measure, upon the depth of legal learning. It must, however, be emphasized that Marshall's was not the ordinary judicial role. Great judges are typically not radical innovators. "I venture to suggest," states Justice Felix Frankfurter, "that had they the mind of such originators, the bench is not the place for its employment. Transforming thought implies too great a break with the past, implies too much discontinuity, to be imposed upon society by one who is entrusted with enforcing its law."[27]

Marshall's role, on the other hand, was as much that of legislator as judge. His was the task of translating the constitutional framework into the reality of decided cases. As one commentator puts it, "[H]e hit the Constitution much as the Lord hit the chaos, at a time when everything needed creating."[28] The need was for formative genius—for the transfiguring thought that the judge normally is not called upon to impose on society. Had he been more the trained lawyer, thoroughly steeped in technical learning and entangled in the intricacies of the law, he might not have been so great a judge; for his role called for the talent and the insight of a statesman capable of looking beyond the confines of strict law to the needs of a vigorous nation entered upon the task of occupying a continent.

One aspect of Marshall's education should not be overlooked, though it was far removed from the traditional type of schooling. This was his service as a soldier of the Revolution. It was, his biographer informs us, his military experience—on the march, in camp, and on the battlefield—that taught Marshall the primary lesson of the necessity of strong, efficient government: "Valley Forge was a better training for Marshall's peculiar abilities than Oxford or Cambridge could have been."[29] Above all, his service with Washington confirmed in him the overriding loyalty to an effective Union. Love of the Union and the maxim "United we stand, divided we fall," he once wrote, were "imbibed . . . so thoroughly that they constituted a part of my being. I carried them with me into the army . . . in a common cause believed by all to be most precious, and where I was confirmed in the habit of considering America as my country and Congress as my government."[30] In his most powerful opinions, it has been well said, Marshall appears to us to be talking, not in terms of technical law, but as one of Washington's soldiers who had suffered that the nation might live.

When all is said and done, nevertheless, an element of wonder remains as we contemplate Marshall's work. The magisterial character of his opinions marching with measured cadence to their inevitable logical conclusion has never been equaled, much less surpassed, in judicial history. Clarity, conciseness, eloquence—these are the Marshall hallmarks, which made his

opinions irresistible, combined as they were with what Edward S. Corwin termed his "tiger instinct for the jugular vein,"[31] his rigorous pursuit of logical consequences, his power of stating a case, his scorn of qualifying language, the pith and balance of his phrasing, and the developing momentum of his argument. His is the rare legal document whose words can be read and meaning understood by the layman as well as the learned practitioner. And all this from a man almost without formal schooling, either in literature or the law. Were we not historically certain of the fact, we might have as much doubt that such an individual, possessed as he was only of raw genius and the courage to use it, really wrote the masterful opinions that served as the doctrinal foundation of a great nation as some have expressed with regard to the authorship by an unschooled Elizabethan actor of the supreme literary products of the English language.

The Chief Justice

The Supreme Court met for the first time in Washington on Februrary 2, 1801. Since only Justice Cushing was present, the Court *Minutes* state, "A sufficient number of Justices [was] not . . . convened to constitute a quorum"[32] and the Court was adjourned. A quorum was present on the rainy winter morning of February 4 and the Court proceeded to the business of the day: the swearing in of the new Chief Justice, who then took his seat upon the bench.

Aside from Marshall's induction, the February 1801 Term saw little done by the Court. Nor did the press take much notice either of the new Chief Justice's appointment or of the sessions at which he first presided. The February 5, 1801, issue of the *National Intelligencer,* then the leading Washington newspaper, noted only "The Justices of the Supreme Court have made a court, Marshall, Cushing, Chase, and Washington."[33] The lack of press interest illustrates both the Court's low prestige at the time and the fact that it had not yet begun to play its important role in the constitutional structure.

The Court's lack of prestige was strikingly shown by the fact that, as seen, no chamber was provided for it when the new capital was being built. Instead, soon after it convened, the House resolved "[t]hat leave be given to the Commissioners of the City of Washington to use one of the rooms on the first floor of the Capitol for holding the present session of the Supreme Court of the United States."[34] A similar resolution was passed by the Senate.

The room assigned to the Court pursuant to these resolutions was one of the first-floor committee rooms, under the south end of the hall assigned to the House of Representatives. The room measured thirty to thirty-five feet; it had two windows. The chamber was heated by a fireplace set in the wall. Where the bench was located has not been ascertained.[35] We do know, however, that the bench was not raised—a feature present in most courtrooms. The room itself, Benjamin Latrobe, the architect of the Cap-